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No. _____

Supreme Court of the United States

OCTOBER TERM, 1992

COCA-COLA BOTTLING COMPANY
OF ELIZABETHTOWN, INC., ET AL.,

Petitioners,

v.

THE COCA-COLA COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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June 18, 1993

QUESTION PRESENTED

Where the district court found that the defendant had committed two distinct breaches of a contract and awarded damages as compensation for one of those breaches, may a court of appeals reverse on the ground that the damages were not justified by the other breach:

* without addressing the particular breach which was the basis of the district court's award of damages to petitioners,

* without disapproving or finding clearly erroneous the district court's findings of fact about the intentions and expectations of the parties on which its findings of breach and damages were based, and

* without disapproving the legal principles relied on by the district court in awarding damages?

LIST OF PARTIES

Petitioners:

Coca-Cola Bottling Company of Elizabethtown, Inc. (also successor by merger to Coca-Cola Bottling Co. of Owensboro)

Wilmington Coca-Cola Bottling Works (also successor by merger to Newbern Coca-Cola Bottling Works)

Coca-Cola Bottling Company of Lehigh Valley (formerly known as Bethlehem)

Plymouth Coca-Cola Bottling Company, Incorporated

Sacramento Coca-Cola Bottling Co., Inc.

Coca-Cola Bottling Company of Shelbyville, Inc.

Coca-Cola Bottling Company of Dickinson

Laredo Coca-Cola Bottling Company

Coca-Cola Bottling Company of Williston

Coca-Cola Bottling Company of LaCrosse Arkansas-Georgia Company (also known as Nashville)

Coca-Cola Bottling Company of Streator

Natchez Coca-Cola Bottling Company

Coca-Cola Bottling Company of Jefferson City

Coca-Cola Bottling Company of Macon

Coca-Cola Bottling Company of Deming

Coca-Cola Bottling Company of Tulsa

Coca-Cola Bottling Company of Brownsville (RGV)

Coca-Cola Bottling Company of San Angelo

Coca-Cola Bottling Company of Tucson

Las Cruces Coca-Cola Bottling Company

Coca-Cola Bottling Company (Alexandria)

Coca-Cola Bottling Company of Marshall

The Cleveland Coca-Cola Bottling Company, Inc.

Central Coca-Cola Bottling Company, Inc.

Magnolia Coca-Cola Bottling Company, Inc.

Coca-Cola Bottling Co. of Jamestown

Love Bottling Company

Trenton Coca-Cola Bottling Co.

Respondent:

The Coca-Cola Company

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OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals reversing the $20 million damage award won by the petitioners in the district court is reported in *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. The Coca-Cola Company (Coke VIII)*, 988 F.2d 386 (3d Cir. 1993) (reprinted at Appendix 1-71a). The issues were tried in three separate trials before the United States District Court for the District of Delaware sitting without a jury. The first trial was conducted in 1986 before Judge Murray M. Schwartz, whose findings of fact and conclusions are reported in *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co. (Coke III)*, 654 F. Supp. 1388 (D. Del. 1986)(Appendix 228-244a). The remaining issues were then tried before Judge Schwartz in 1988-89. Prior to the decision, however, the parties were informed that Judge Schwartz was too ill to issue an opinion and the case was transferred to Judge Joseph J. Farnan. The case was then retried in 1990-1991 before Judge Farnan whose findings and conclusions of law are reported in *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co. (Coke VII)*, 769 F. Supp. 599 (D. Del. 1991)(Appendix 72-227a).[1]

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[1] The other opinions of the district court are:

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co. (Coke I), 95 F.R.D. 168 (D. Del. 1982).

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co. (Coke II), 98 F.R.D. 254 (D. Del. 1983).

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co. (Coke IV), 654 F. Supp. 1419 (D. Del. 1987).

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co. (Coke V), 668 F. Supp. 906 (D. Del. 1987).

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co. (Coke VI), 696 F. Supp. 57 (D. Del. 1988).

GROUNDS FOR JURISDICTION

On February 17, 1993, the Third Circuit reversed the district court's decision awarding petitioners a judgment exceeding $20 million against The Coca-Cola Company (the "Company") for breach of the price terms of their Coca-Cola bottling contracts. The Third Circuit affirmed the findings of breach in the bottlers' favor, but ruled that the bottlers were entitled only to nominal damages of $1.00. Petitioners' timely motion for rehearing was denied on March 23, 1993. Appendix 295a.

STATEMENT OF THE CASE

This case arose in 1980, when, after unilaterally replacing the sugar in Coca-Cola Bottlers' Syrup with a cheaper sweetener made from corn (HFCS), the Company continued to charge the petitioners a syrup price that was calculated under a sugar-based cost-plus contractual formula. The district court ruled that the Company had committed two distinct breaches of the bottlers' contracts. First, the Company breached by substituting HFCS for sugar in Coca-Cola Bottlers' Syrup without the consent of the bottlers. *Coke VII* at 629 (¶ 96); Appendix 129-130a. The district court's damage award was not, however, based on this breach by the Company.

Second, the Company breached the *price terms* of the bottlers' contracts and overcharged the bottlers for HFCS-sweetened syrups. The Company refused to share any of the savings it realized from using the cheaper HFCS and instead continued calculating the bottlers' syrup price under a contractual formula that was intended to apply only to Coca-Cola syrups that were sweetened with 5.32 pounds of sugar. *Coke VII* at 629 (¶ 97); Appendix 130a. The district court's damage award was based on this pricing breach by the Company. In awarding the bottlers $20 million, the district

court held that the bottlers were entitled to recover the savings from the Company's use of the cheaper sweetener. *See Coke VII* at 629-30 (¶¶ 98-101); Appendix 130-131a.

The court of appeals specifically agreed with the district court that the parties did not intend to use "a sugar-based pricing formula for a syrup that does not contain sugar." *Coke VIII* at 408; Appendix 56a. While it affirmed the district court's findings of breach, the Third Circuit reversed the damage award on the ground that the substitution of HFCS for sugar had not caused the bottlers to lose either sales or profits. The Third Court directed that the bottlers be awarded $1.00 in nominal damages.

This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. 1254(1) (West Supp. 1993). In reversing the district court, the Third Circuit did not address whether the $20 million judgment was authorized as compensation for the Company's separate breach of the *price* terms of the bottlers' contracts, which was the very foundation of the district court's decision to award compensatory damages. By this action, the court of appeals exceeded its authority as an appellate court, violated Fed.R.Civ.P. 52(d), deprived the petitioners of procedural due process, and as a result, "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers" under Rule 10.1(a) of the Rules of this Court.

STATEMENT OF FACTS

The petitioners are 30 Coca-Cola bottlers located throughout the United States. Many of petitioners' families have been bottling Coca-Cola under perpetual contracts with the Company since 1901 and were the early pioneers in developing the Coca-Cola bottling business. *See The*

Coca-Cola Bottling Co. v. The Coca-Cola Co. (Coke 1920), 269 F. 796 (D. Del. 1920).

A. *The History of the Coca-Cola Contracts*

1. *The 1899 Contract*

In 1892, Asa Candler formed The Coca-Cola Company to market Coca-Cola as a *soda fountain* beverage. Petitioners' rights as Coca-Cola bottlers originate from an 1899 contract in which the Company conveyed all of its rights to engage in the Coca-Cola *bottling* business (including property rights in the Coca-Cola trademarks and goodwill associated with that business) to predecessors of the petitioners who were known as "parent bottlers." *See Coke 1920; Coke III.*

Under the 1899 contract, the Company agreed to supply syrup at a fixed price, and the parent bottlers agreed to establish bottling plants sufficient to supply the demand for bottled Coca-Cola. The parent bottlers in turn assigned their exclusive bottling rights to "first-line" bottlers. These individuals invested in the bottling plants and equipment, processed the syrup into a finished product, and sold Coca-Cola to consumers. It was the parent bottlers, and not the Company, who recruited petitioners' ancestors, individuals in local communities throughout the United States, to invest the capital and build the bottling plants, and develop the know-how to bottle Coca-Cola.[2] *Coke 1920; Coke III* at 1392; Appendix 233a.

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[2] The Company's decision to convey the entire bottling business to the parent bottlers proved quite astute. By 1920 there were over 1,000 independent Coca-Cola bottlers throughout the United States. The bottlers' investment in plant and equipment was four times greater than that of the Company. *Coke 1920*, 269 F. at 801, 808. As a result of the bottlers' efforts to promote bottled Coca-Cola, and the Company's efforts to promote the soda-fountain drink, Coca-Cola became the dominant soft drink beverage in the United States.

2. *The 1920 Litigation*

The bottlers brought suit in 1920 when the Company sought to terminate the bottlers' fixed price contracts after the bottlers had refused to concede the Company the power to raise the price of syrup unilaterally. *Coke III* at 1393-94; Appendix 235-40a. The District Court of Delaware rejected the Company's claim that the bottlers were mere licensees and that the bottlers' contracts were nothing more than agreements to supply syrup which could be terminated at will. *Coke 1920*, 269 F. at 808-10. The court held that the bottlers' contracts were a perpetual *conveyance* by the Company to the bottlers of the *entire* business of bottling Coca-Cola, including all property rights, goodwill, and trademarks. *Id.*

3. *The Consent Decrees*

The cases were settled in 1921, and the settlement agreements were entered as decrees of the district court. These consent decrees have governed the relationship between the Company and the petitioners for more than 70 years. The decrees reaffirmed the perpetuity of the bottlers' contracts, and prohibited the Company from terminating the bottlers' contracts, except for cause.

In the consent decrees, the bottlers agreed to a higher syrup price by forsaking their $1.20 per gallon fixed price contract which was replaced by the equivalent of a cost-plus pricing formula for Coca-Cola syrup. Under the consent decrees, the Company was allowed to charge the bottlers a minimum of $1.30 per gallon for syrup. The Company was prohibited from raising the price of Coca-Cola syrup except to pass on increases in the market price of sugar.

Paragraph 6 of the decrees contained the actual bottlers' syrup pricing formula:

> 6. In order to promote the sale of Coca-Cola and enable the actual bottlers to compete with other beverages, [the parent bottler] hereby agrees to sell such syrup to the [actual] bottlers . . . at not exceeding one dollar and thirty cents ($1.30) per gallon, including five cents (5¢) per gallon for advertising . . ., and an additional six cents (6¢) per gallon for such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per pound . . . .

App. at 4407, 4417.[3] Sugar was chosen as the index because at that time, 5.32 pounds of sugar were used by the Company to sweeten a gallon of Bottlers Syrup. Sugar was the principal and most expensive ingredient in the syrup. *See Coke III* at 1401-03; Appendix 253-59a; *Coke VII* at 628 (¶ 89); Appendix 127a ("use of 5.32 pounds of sugar per gallon forms the basis of the pricing provisions of both the Consent Decrees and the unamended contracts").[4]

This pricing formula allowed the Company to pass on its increased cost when sugar prices rose, and conversely *required the Company to pass on the savings when sugar prices declined*. *See Coke VII* at 626-27 (¶¶ 73-77); Appendix 123-

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[3] "App." citations reference the joint appendix filed by the parties with the Court of Appeals on September 16, 1991.

[4] The difference between the 5.32 pounds of sugar used in the syrup and the factor of 6 used in the pricing formula was intended to compensate the Company for *"all possible increases in the cost of producing such syrup,"* other than the sweetener. *Coke III* at 1402 n.13 (emphasis added); Appendix 256a. *Accord* App. 3784-87 (the difference between 5.32 and 6 was to give the Company some room to offset inflationary costs other than increased sugar prices).

124a. For example, if the price of sugar rose from 10¢ to 20¢, the Company was allowed to pass on the increased cost to the bottlers by raising their syrup price 60¢ per gallon. Conversely, if the price of sugar declined from 20¢ to 10¢, the cost-plus formula worked in the bottlers' favor by requiring the Company to *pass on* the sweetener savings to the bottlers by reducing the price of syrup by 60¢. *Coke VIII* at 407 n.20; Appendix 52a.

To prevent the Company from evading the price terms of the consent decrees and cheating the bottlers out of the benefit of their economic bargain by substituting a cheaper sweetener for the 5.32 pounds of sugar upon which the syrup pricing formula had been predicated, the consent decrees prohibited the Company from changing the sweetener in Coca-Cola without the consent of the bottlers. In ¶ 10, the consent decrees provided that the syrup be "high grade standard Bottlers Coca-Cola Syrup, and . . . contain not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup." *Coke III* at 1401; Appendix 255a; *Coke VII* at 625-26 (¶¶ 67-69), 629-30 (¶¶ 97-101); Appendix 162a, 169-170a.

4. *The 1921 Amendment to the Bottlers' Contracts*

The consent decrees necessitated that the individual bottlers' contracts also be amended to conform to the requirements of the consent decrees. The fixed price provisions of the bottlers' contracts which had existed prior to 1921 were eliminated and replaced by a new ¶ 4(d) that incorporated the cost-plus formula in the consent decrees.

The cost-plus method of pricing Coca-Cola syrup worked extremely well and created a harmonious and mutually profitable relationship between the Company and the Coca-Cola bottlers for almost 60 years. In 1978, however, the

Company announced that it wanted to renegotiate the contracts. The Company circulated an amendment that allowed the Company to charge the bottlers significantly higher prices for Coca-Cola syrup. By 1980, after two years of extensive lobbying by the Company, approximately 300 bottlers had signed the 1978 Amendment. Over 100 Coca-Cola bottlers remained strongly opposed to the 1978 Amendment and had refused to sign. *See Coke I*, 95 F.R.D. 168, 174 (D. Del. 1982). These bottlers became known as the "unamended bottlers."

B. *The Substitution of HFCS for Sugar*

In January 1980, without consulting or seeking the consent of the Coca-Cola bottlers, the Company announced that it was changing the formula for Coca-Cola. The Company replaced the sugar in Coca-Cola with a new and cheaper sweetener made from corn starch known as "high fructose corn syrup" ("HFCS").[5] The unamended bottlers were not given the option of continuing to receive syrup sweetened with sugar because the Company intended to discontinue the use of sugar in Coca-Cola and convert the entire system to HFCS-55.

C. *The Company Charged the Unamended Bottlers for Sugar*

The Company announced that it would pass on the savings from the cheaper sweetener only to the amended bottlers. Despite acknowledging that it would be mutually beneficial if the HFCS savings were passed through to the unamended bottlers for consumer demand building activities, the Company refused to share any of the HFCS savings with

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[5] The Company had learned that Pepsi was experimenting with HFCS and moved forward with the substitution in Coke based on its concern that Pepsi's use might put Coca-Cola bottlers at a competitive disadvantage. App. 4618-19; 6662-63.

From 1980 until December 1987, the Company charged the unamended bottlers the same price for HFCS-sweetened syrups that it would have charged for Coca-Cola syrup sweetened with sugar, as if the substitution had never occurred. *Coke VII* at 619; Appendix 106a.

D. *The Allegations of the Complaint*

The Company's refusal to adjust the syrup price to reflect the use of HFCS lead to this suit challenging the Company's asserted right to change the formula without the bottlers' consent *and* to charge a sugar-based syrup price for syrup that contained no sugar. Coca-Cola Bottling Company of Elizabethtown, Inc., filed a complaint in the United States District Court for the District of Delaware in February 1981. Jurisdiction in the district court was based on complete diversity of citizenship of the parties. 28 U.S.C. § 1332.

The complaint alleged, *inter alia*, that the Company had breached the bottlers' contracts and the consent decrees in two ways. The *first* breach occurred when the Company unilaterally *changed the formula* for Coca-Cola syrup without the bottlers' consent and *substituted* HFCS for sugar. This breach was independent of the Company's pricing of the HFCS sweetened syrup.

The second claim of breach was based on the price of the HFCS syrups. As recognized by the district court: "The unamenders brought this suit alleging *that the Company's continued use of a sugar-based price overcharged them* and seeking a pass-through of the Company's HFCS savings." *Coke VII* at 613 (emphasis supplied); Appendix 92a.

E. *The Consent Decree Issues*

In *Coke III*, the district court resolved the parties conflicting views on the meaning of the terms "sugar" in ¶ 10

and "market price" in ¶ 7 of the consent decrees.[6] *Coke III* was a significant victory for the bottlers. The district court *rejected* the Company's primary defense that it was permitted to charge a sugar-based syrup price because HFCS-55 was a form of "sugar" as that term was used in ¶ 10 of the consent decrees. *Coke III* at 1397-1406; Appendix 244-66a. The court also *rejected* the Company's contention that since the taste of Coca-Cola sweetened with HFCS was identical to Coca-Cola sweetened with sugar, the bottlers had not been "cheated of their bargain" by the substitution of HFCS for sugar. *Id.* at 1402-03; Appendix 255-59a. The court found:

> **The express competitive-pricing rationale recited in paragraph 6 for tying the price of syrup to the price of sugar at a six-to-one ratio is undermined if the Company can use a cheaper sweetener but continue to employ the paragraph 6 pricing mechanism. The requirement of 5.32 pounds of sugar in paragraph 10 ensures the Company cannot evade the pricing provisions of paragraphs 5, 6, and 7, and increase the effective syrup price to the bottlers, by reducing the amount of sugar to less than 5.32 pounds or by using cheaper substitutes.**

Id. at 1402 (emphasis supplied); Appendix 256a. The court also held that the effect of ¶ 10 was to require the Company "to secure the consent of the bottlers before that change [in the sweetener in Coca-Cola] is made." *Id.* at 1403; Appendix 257a.[7]

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[6] The district court had certified these issues for class determination on behalf of a class of unamended bottlers. The court also had severed these issues for separate trial under Fed.R.Civ.P. 42(b).

[7] The Company moved to alter or amend the findings and judgment entered in *Coke III*. *See Coke IV*, 654 F. Supp. at 1427 ("[w]ith regard to the meaning of sugar and HFCS-55, [the Company] seeks to convert defeat into victory."). Judge Schwartz denied the Company's motion.

F. *The Contract Issues*

The district court addressed the petitioners' remaining contract claims in *Coke VII*. The district court ruled that the Company had breached the bottlers' contracts not once, but *twice*.

1. *The Substitution Breach*

The district court held that the Company breached the bottlers' contracts in 1980 when it changed the formula and replaced the sugar in Coca-Cola with HFCS-55 without first obtaining the consent of the bottlers:

> 96. The Court concludes the Company's unilateral substitution of HFCS for granulated sugar from cane or beet in the syrup supplied to plaintiffs from 1980-1987 without plaintiffs' consent was a breach of their right under the unamended contracts to receive the same syrup which the Company was obligated to provide the parent bottlers pursuant to paragraph 10 of the Consent Decrees.

Coke VII at 629; Appendix 129-130a.

2. *The Pricing Breach*

The district court also found that the Company committed a *separate* breach of the pricing provisions of the bottlers' contracts (¶4(d)) by charging the unamended bottlers a sugar-based price for the HFCS-sweetened syrup that contained no sugar:

> 97. The Court concludes that the Company ***also breached*** the unamended contracts by charging plaintiffs a syrup price based upon the price of sugar for a syrup which did not contain 5.32 pounds of sugar per gallon. A plain reading of the

> Consent Decrees and unamended contracts reveals an inextricable linkage between the syrup pricing provisions and the use of 5.32 pounds of sugar per gallon to sweeten the syrup.

Coke VII at 629 (emphasis supplied); Appendix 130a.

G. *The Bottlers Were Damaged By The Company's Pricing Breach*

Both judges held that the intent of both the Consent Decrees and the bottlers' contracts was to prohibit the Company from

1. evading the pricing provisions in the bottlers' contracts by using a cheaper sweetener as a substitute for 5.32 pounds of sugar, and thereby
2. cheating the bottlers of the economic bargain that they had made in 1921 when they relinquished their rights to buy Coca-Cola syrup from the Company at a fixed price, and agreed to the formula price contained in ¶ Fourth(d) of the bottlers' contracts.

Rejecting the Company's "no damage" argument, *both* the district judges found that the bottlers were damaged by the Company's pricing of the HFCS-sweetened syrup under the sugar-based formula of ¶ 4(d).

Judge Schwartz, who presided over the *Coke III* trial, specifically rejected the Company's claims that the unamended bottlers were not "cheated of their bargain" (*i.e.*, damaged) by the Company continuing to charge a sugar-based price, even though the syrup contained a cheaper substitute.

> Defendant argues that so long as the strength of the syrup is maintained (*i.e.*, the cheaper sweetener

> is not an inferior sweetener), bottlers are not cheated of their bargain if the Company uses a cheaper sweetener. . . .
>
> **The short answer to defendant's argument, and the fact to which the Court must return, is that the 1921 Consent Decrees were premised on the use of granulated cane sugar as a sweetener. In light of the experience of the parties prior to the entry of the Decrees, as well as the strong bargaining position enjoyed by the bottlers after the decision of this Court and argument before the Court of Appeals, the Court finds it unlikely they would enter into an agreement that allowed the Company to exploit a cheaper sugar in the manufacture of Coca-Cola Bottlers Syrup but keep the price of that syrup tied to the price of granulated sugar.**

Coke III at 1402-03; (emphasis supplied); Appendix 257a.

Judge Farnan, who presided over the second trial during Judge Schwartz' illness, concurred with Judge Schwartz' earlier rulings.

> 98. The Court agrees with and hereby adopts Judge Schwartz' finding that paragraph 10 of the Consent Decrees serves both a quality control function and a price-protecting function. *Coke III* at 1402. **By linking the syrup price to the use of 5.32 pounds of sugar per gallon, the parties in 1921 ensured the Company could not evade the pricing provisions by decreasing the amount of sugar used and thus diluting the strength of the syrup or by using a cheaper sweetener.** *Id.*

Coke VII at 629 (emphasis supplied); Appendix 130a.

Judge Farnan further ruled that the Company had breached the linkage between the Company's use of 5.32 pounds of sugar per gallon of syrup and the syrup pricing provisions of ¶ 4(d) which was "a fundamental assumption of [both] the unamended contracts and Consent Decrees."

> 99. **The Court concludes that the linkage between the quality statement in paragraph 10 of the Consent Decrees as incorporated into the unamended contracts and the syrup pricing provisions is a fundamental assumption of the unamended contracts and Consent Decrees which may be contravened only by an amendment to the contracts or Decrees.** As previously stated, plaintiffs have not manifested assent to the Company's offer to unlink the use of 5.32 pounds of sugar per gallon and the pricing provisions by supplying HFCS-sweetened syrup to plaintiffs at a sugar-based price. At the same time, the Company has not manifested assent to amending both paragraph 10 and the pricing provisions to allow for provision of HFCS-sweetened syrup at an HFCS-based syrup price. Consequently, the unamended contracts and the Consent Decrees remain unamended and require that the syrup be sweetened with 5.32 pounds of granulated sugar from cane or beet at a syrup price based upon the price of sugar.
>
> 100. **The Court concludes that, by providing plaintiffs with an HFCS-sweetened syrup at a sugar-based price, the Company breached the linkage between the use of 5.32 pounds of sugar per gallon of syrup as required paragraph 10 of the Consent Decrees as incorporated into the una-**

> **mended contracts and the pricing provisions and violated a fundamental assumption of both the Consent Decrees and unamended contracts.**

Coke VII at 629-30 (emphasis supplied); Appendix 130-31a.

As a result of the Company' *pricing* breach, the district court ruled that the bottlers' contractual expectancy could be restored only by awarding them the savings resulting from the use of HFCS in place of sugar. *Coke VII* at 630 (¶ 101); Appendix 131a.

> 101. As compensation for the Company's breach, plaintiffs are entitled to "expectation damages," or damages which would restore the fundamental assumption of their contracts. *See Restatement (Second) of Contracts* § 347; *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 634 (3d Cir. 1984). Because the price of sugar has at all times relevant to this suit been greater than 7¢ per pound so that the bottlers have at all relevant times paid a syrup price greater than the base price of $1.30 per gallon, **the inextricable linkage between the use of 5.32 pounds of sugar per gallon and the pricing provisions can be restored only by awarding plaintiffs one-hundred percent of the savings resulting from the use of the cheaper HFCS in place of sugar.**

Coke VII at 629-30 (emphasis supplied); Appendix 131a.

In short, the district court found that the Company could not evade the contractual pricing formula and increase its profits at the bottlers' expense by changing sweeteners and not adjusting the syrup price to reflect the change. Based on these findings of fact as to the parties' intentions in 1921,

the district court found that the Company had overcharged the petitioners for HFCS syrups over a seven-year period. To preserve the bottlers' expectation that they would pay a sugar-based price only if the syrup contained sugar, the district court awarded the $20 million in HFCS savings to the bottlers.

H. *The Ruling of the Court of Appeals*

The Third Circuit recognized that the findings in *"Coke III* [are] of central importance to this appeal." *Coke VIII* at 399; Appendix 32a. The Third Circuit also acknowledged that the findings in both *Coke III* and *VII* concerning "[t]he intent of the parties to ambiguous provisions in a contract," had been concurred in by two district judges and involved "question[s] of fact that an appellate court can set aside only if it is clearly erroneous." *Coke VIII* at 401; Appendix 38a.

The court of appeals did not, however, reject any of the factual findings in *Coke III* or *Coke VII*. To the contrary, the Third Circuit expressly endorsed a finding in *Coke VII* in which Judge Farnan found:

> 69. Because both the base price and the escalator provisions were premised on the market price of the amount of sweetener then in use, the Court finds it highly unlikely that the parties could have intended the application of a sugar-based pricing formula to a syrup that did not contain sugar.

Coke VII at 625-26. Appendix 52a. The Third Circuit said: "**To the extent that Finding No. 69 implies the parties did not intend to use a sugar-based pricing formula for a syrup that does not contain sugar, it is correct.**" *Coke VIII* at 408; (emphasis supplied); Appendix 56a.

The Third Circuit also recognized the cost-plus nature of the syrup pricing formula. It quoted ¶ 6 of the consent decrees that "[t]he pricing formula was 'to include all possible increases in **the cost of producing such syrup**' by the Company." *Coke VIII* at 395 (emphasis supplied); Appendix 22a. The court explained that:

> This constant ratio of six cents per gallon of syrup for every one cent increase in the price of a pound of sugar **exactly mirrors the cost increase attributable to 5.32 pounds of sugar** the decrees require the Company to use in each gallon of standard bottlers' syrup, rounded up to the next whole number.

Coke VIII at 407 n. 20 (emphasis supplied); Appendix 52a.

The Third Circuit also did not disagree with the district court's analysis of the law of contracts. To the contrary, the appellate court agreed that under the principles set forth in the *Restatement (Second) of Contracts* § 347 (1981), the bottlers would be entitled to recover damages if they "suffered any loss of the economic expectancy" or benefit they hoped to obtain from their bargain with the Company because of the Company's breach. *Coke VIII* at 391; Appendix 12a.

However, the Third Circuit failed to apply these recognized legal principles to the Company's breach of the *pricing provisions* of the bottlers' contracts. The Third Circuit reversed by focusing exclusively on the Company's substitution of HFCS for sugar in Coca-Cola as if that had been the Company's *only* breach of the bottlers' contracts. The Third Circuit never addressed whether the judgment was supported by the district court's separate findings that the Company had also breached the *pricing provisions* of the bottlers' contracts. This second breach by the Company of the intended purposes of the pricing provisions (*i.e.*, link the syrup price to the sweet-

ener used to prevent the Company from cheating the bottlers by using cheaper sweetener substitutes) was the backbone of the district court's $20 million damage award to the bottlers to compensate for their loss of the benefit of the bargain or "expectation interests." *Coke VII* at 629-30; Appendix 129-34a.

The Third Circuit adopted the Company's argument that the bottlers cannot recover the savings that the Company achieved as a result of using HFCS because the bottlers would be in a "better position than they would have been had no breach occurred." *Coke VIII* at 407-408; Appendix 54a.[8] That conclusion ignores, however, both the cost-plus nature of the syrup price formula and the parties' intentions, as found by the district court, to link the syrup price to the sweetener actually used.

The appellate court's misunderstanding of the basis of the district court's award of damages is apparent from its misstatement of the district court's ruling:

> On Count One, the district court held that the Company had breached the 1921 bottling contracts when it unilaterally **substituted** the cheaper HFCS-sweetened syrup for sucrose [sweetened syrups] and that the bottlers suffered contractual damages as a result of **that** breach.

Coke VIII at 406 (emphasis supplied); Appendix 50a.

The Third Circuit's discussion of the damage issues focused exclusively on the Company's *substitution* of HFCS for sugar (the "formula change" breach) in Coca-Cola syrup. The court agreed that the district court was correct in ruling

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[8] This argument had been rejected three times by the district court. *See Coke III* at 1402-03; Appendix 255-59a; *Coke VI*, 696 F. Supp. at 57, 76 (D. Del. 1988); *Coke VII* at 625-26 (¶¶ 67-69); 629-30 (¶¶ 97-101); Appendix 121-22a, 130-31a.

that the Company had breached the bottlers' contracts by unilaterally substituting HFCS for sugar in the Coca-Cola syrups that it supplied to the bottlers from 1980 to 1987. *See Coke VII* at 629 (¶ 96); Appendix 129-30a. Thus, it is clear that the appellate court ruled that the bottlers did not sustain any damages *as a result of that breach:*

> Here, it is uncontested that the HFCS-sweetened syrup is of the same quality as the promised sucrose-based syrup. It is equally acceptable to the consumers of Coca-Cola to whom the bottlers sell, and the bottlers have suffered no loss of sales as a result. The bottlers lost no expectancy by virtue of the **substitution.** Absent such a loss, no damages are recoverable in contract.

Coke VIII at 409 (emphasis supplied); Appendix 59a. The Third Circuit either misconstrued or ignored the district court's finding that the separate pricing breach was the foundation for the award of damages.

The concluding paragraph of that portion of the opinion leaves no doubt that the Third Circuit's ruling was based only on the substitution breach, and not on the separate breach of the *pricing* of HFCS-sweetened syrup.

> Our conclusion is not inconsistent with the district court's determination that Paragraph Ten is a "quality control" provision. While we agree that the unilateral actions of the Company breached the quality control aspects of its bargain, it is incumbent upon the bottlers to demonstrate loss resulting from the change in sweeteners. Under an expectancy theory, compensation follows a loss of expected benefit. The Consent Decrees entitled the bottlers to a syrup that, *inter alia*, smelled, tasted, looked and sold like syrup

> sweetened with 5.32 pounds of sugar. The HFCS syrup met these qualifications. Absent a decrease in quality, the bottlers have suffered no loss of expectancy. Accordingly, the judgment of the district court on Count One must be modified to eliminate its award of expectancy damages to the bottlers and to substitute therefor nominal damages of $1.00.

Coke VIII at 410; Appendix 61a.[9]

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[9] The Third Circuit also refused to consider whether the petitioners were entitled to recover under a restitution theory. The court said the award of damages for a substitution breach "can only be justified on a theory of restitution." *Coke VIII* at 408; Appendix 55a. The court erroneously assumed that when the bottlers dismissed Count Two of the original complaint, they abandoned any claim under a restitution theory. *Coke VIII* at 397; Appendix 28a.

The bottlers did not "abandon" a restitution theory by dismissing the original Count Two. The original Count Two was a distinct claim that the Company had breached a separate 1907 Agreement (Dkt. 1 ¶¶ 14-15, 50-53). When the bottlers later dismissed Count Two voluntarily and without prejudice, they did not abandon *any* remedies under Count One.

Moreover, the bottlers were entitled under Rule 54(b) to *all* relief available under *any* theory "even if the party has not demanded such relief in the pleadings." The relief demanded under Count One included not only monetary compensation for the Company's failure to pass on the savings, but also a claim for "unjust enrichment" (*see Coke VI*, 696 F. Supp. at 75, 76), and more comprehensively a demand *"for such other and further relief, legal or equitable,* as may be just." Dkt. 1 at 25. The same claims were contained in the bottlers' supplemental complaint. Dkt. 570 ¶ 52; prayer for relief pp. 32-33.

The *Restatement (Second) of Contracts* § 344 (1981) states that contract remedies are to protect "one or more of the following interests of a promisee": expectation interest, reliance interest, or restitution interest. As the *Restatement* makes clear, these interests are not mutually exclusive. Additionally, the Comment states that "[t]he interests described in this Section are not inflexible limits on relief and in situations in which a court grants such relief as justice requires, the relief may not correspond precisely to any of these interests." *Id.* Comment a. Thus, the Third Circuit should have considered restitution as a remedy for the Company's substitution breach. *See* III E.Allen Farnsworth, *Contracts*, § 12.20c at 350-53 (2d ed.1990).

REASONS FOR GRANTING THE WRIT

This Court should exercise its supervisory power to grant certiorari under Rule 10.1(a) because the ruling of the Third Circuit "has so far departed from the accepted course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. Rule 10.1(a).

First, the Third Circuit failed to perform that most basic duty which is the *raison d'etre* of its existence as an appellate court—*the duty to rule on the issues as they were decided by the district court.*

Second, the court exceeded its authority by violating the rules of appellate procedure that allocate functions between the district courts and the appellate courts. This Court has emphasized that "the proper observance of the division of functions between the federal trial courts and the federal appellate courts" is "important in every case." *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406, 410 (1977). This Court has also stressed that ensuring adherence to these rules by the appellate courts is "every bit as important" as ensuring that the appellate courts decide the substantive issues in a case correctly. *Id.* at 409-10.

In *Dayton* this Court articulated the limited powers of the courts of appeals to reverse judgments of the district courts. Writing for the majority, Justice Rehnquist said:

> On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. **If it concludes the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Pro. 52(a). If it decides that the district court has misapprehended the law,**

> **it may accept that court's findings of fact but reverse its judgment because of legal error.**

Id. at 417-18 (emphasis supplied). In *Dayton*, as in this case, "the Court of Appeals did neither" (*id.* at 418), and that failure by the appellate court to rule squarely on the issues was held to be error requiring reversal. *Id.*

Third, the failure of the Third Circuit to rule on the issues that were decided by the district court also deprived petitioners of procedural due process. Appellate courts are obligated by the due process clause of the Fifth Amendment to observe procedural limitations on their powers of appellate review. Appellate courts are prohibited from reversing a district court without first determining that the district court's ruling was based on "clearly erroneous" factual findings or an error of law. *Dayton*, 433 U.S. 406. By reversing the judgment of the district court without disapproving of either the facts or the law on which that judgment was based, the Third Circuit deprived the petitioners of procedural due process. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

A. *The Third Circuit Did Not Hold That The Findings Of The District Court Were Clearly Erroneous*

The district court made extensive findings of fact about the intentions and expectations of the parties in 1921 when they agreed upon the syrup pricing formula contained in both the consent decrees and ¶ 4(d) of the bottlers' contracts. The Third Circuit acknowledged that the findings in *Coke III* and *Coke VII* as to "[t]he intent of the parties to ambiguous provisions in a contract [or a consent decree] is . . . a question of fact that an appellate court can set aside only if it is clearly erroneous." *Coke VIII* at 401; Appendix 38a. The court did not disapprove of any of the district court's factual findings. To

the contrary, the Third Circuit expressly stated that the district court "was correct" in finding that "the parties [did not intend to use] a sugar-based pricing formula for a syrup that does not contain sugar." *Coke VIII* at 408; Appendix 56a.

The district court found that the Company had breached the intent of the price terms of the bottlers' contracts by applying them to the HFCS-sweetened syrups. *Coke VII* at 629 (¶ 97); Appendix 130a. This finding was a finding of ultimate fact (or a mixed question of law and fact) that was governed by the "clearly-erroneous rule." *See Pullman-Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982). The Third Circuit did not address these findings by the district court or purport to set them aside under Rule 52(a).

The district court also found that the petitioners were damaged by the Company's application of the sugar-based syrup price formula to the HFCS-sweetened syrups. The district court specifically found that the Company's actions in pricing the HFCS-sweetened syrups were contrary to the intentions of the parties and damaged the bottlers by depriving them of the benefit of their economic bargain. *Coke VII* at 629-30 (¶¶ 98-101); Appendix 130-31a. The determination of whether a party has been damaged is a question of fact (*see Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 254 (1946); *Storey Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555 (1931)), which can be set aside only if clearly erroneous. The Third Circuit did not disagree with the district court's findings in this respect. To the contrary, *the Third Circuit agreed that the Company's actions in pricing the HFCS-sweetened syrups were contrary to the intent of the parties. See Coke VIII* at 408; Appendix 56a.

B. *The Third Circuit Did Not Hold That The Law Applied By The District Court Was Wrong*

The Third Circuit agreed with the district court that the law of contracts permits recovery of "expectation damages" in breach of contract cases to compensate for the loss of the benefit of an economic bargain. Both courts relied on § 347 of the *Restatement (Second) of Contracts*. Thus, the Third Circuit acknowledged:

> It is an "assumption of contract law that the principal purpose of the rules relating to breach is to place the injured party in as good a position as he would have been had the contract been performed." Under this principle, damages in contract are generally measured by the loss of economic expectancy the non-breaching party suffers as a result of the failure of performance . . . [citing § 347] . . . courts sometimes resort to a restitution measure of damages; but damages measured by the monetary value of the benefit unjustly reaped by the breaching party are permitted on a contract theory . . . if a loss of expectancy has been established that is otherwise unquantifiable in pecuniary terms.

Coke VIII at 409 (citation omitted); Appendix 58-59a.

The Third Circuit applied this principle to the Company's substitution of HFCS for sugar as though that was the Company's only breach of the bottlers' contracts. *See Coke VIII* at 409; Appendix 57-59a. However, the district court had not based its award on the substitution breach. The district court awarded damages to the bottlers as compensation for the Company's breach of the price terms of ¶ 4(d) of the bottlers' contracts. *Coke VII* at 629-30 (¶¶ 97-101);

Appendix 130-31a. Like a ship passing in the night, the Third Circuit never addressed the pricing breach. If it had, the district court's award of damages to the bottlers would have been affirmed.

C. *Expectation Damages Are An Appropriate Remedy For The Company's Breach Of The Bottlers' Cost-Plus Pricing Formula*

The Third Circuit understood that the bottlers' syrup pricing formula was equivalent to a cost-plus contract. *See Coke VIII* at 395, 407 n.20; Appendix 22a, 52a. Cost-plus contracts are perfect cases in which courts should award the savings achieved as a result of a breach as "expectation interest" damages to compensate the non-breaching party for the loss of the benefit of his bargain.

For example, when a builder who is a party to a cost-plus contract substitutes a cheaper material (or ingredient) for the material specified in the contract without the consent of the owner, the builder has breached the specifications of the contract. If the builder refuses to pass on the savings to the owner, he is guilty of a second and separate breach of the price terms of the contract. Allowing the builder to keep the savings (or the Company to keep the HFCS savings) would reward him for breaching the contract and would encourage similar breaches in the future. The only possible remedy that will compensate the owner for the loss of the benefit of his economic bargain resulting from the breach of the *price* provisions of his agreement with the builder is to award the savings to the owner as damages. These damages are in addition to any other damage that the owner may have suffered from the substitution itself in the form of either diminished value or quality of the house.

The soundness of this proposition is self-evident and can be demonstrated by a simple illustration:

> A homeowner entered into a cost-plus contract with a contractor to build a house according to plans that specify a particular kind of brick. The brick specified in the contract cost $1.00 each. Instead of using the brick specified in the contract, the general contractor finds a cheaper brick that, in the words of the Third Circuit, "smelled, tasted, looked and sold" (*Coke VIII* at 410) like the brick specified in the contract, but cost only 50¢. The contractor substitutes the cheaper 50¢ brick for the more expensive brick specified in the contract, without the owner's permission. The contractor charges the homeowner for the $1.00 brick specified in the contract—not the cheaper substitute that he actually used in the construction—and the contractor pockets the savings.

No one would seriously suggest that because the cheaper 50¢ brick used by the contractor was just as good as the $1.00 brick specified in the contract, that the contractor had not breached *both* the specification and the cost-plus pricing provisions of the contract. Likewise, no one would argue that the homeowner is in the same position that he would have occupied if the contractor had not breached.

If the contractor had complied with the cost-plus features of the contract, he would have passed on the savings from the substitution of the cheaper 50¢ brick to the homeowner. The contractor could not keep the savings simply because the cheaper brick was equally acceptable to consumers as the more expensive brick specified in the contract and resulted in no diminution in the value of the end

product—the house. The builder's failure to pass-through the savings was a breach and deprived the homeowner of the benefit of the cost-plus price bargain. The homeowner is entitled to recover the savings from the use of a cheaper brick as damages to compensate him for the breach of the price terms of the contract.

If the Third Circuit had addressed the pricing breach, it would have agreed with the district court's factual findings that the bottlers were deprived of the benefit of their economic bargain when the Company used a sugar-based syrup price for HFCS-sweetened syrups and pocketed the HFCS savings. The Third Circuit also would have recognized that it is irrelevant whether a Coca-Cola sweetened with HFCS (like the house constructed with 50¢ bricks) would be "equally satisfactory" as compared to a Coca-Cola sweetened with sugar. The bottlers, like the homeowner, were cheated of their *pricing* bargain. This is precisely the harm that both Judge Schwartz and Judge Farnan found the parties intended to prevent.

CONCLUSION

The Third Circuit failed to perform the first duty of an appellate court—to rule on the issues as they have been decided by the district court and which were the basis for the district court's decision to award damages to the petitioners. By reversing without ruling on these issues, the Third Circuit violated the most elementary principles of appellate review, transgressed the allocation of functions between district courts and courts of appeals, and deprived the petitioners of procedural due process. This case is, therefore, one in which the court of appeals has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers" under Rule 10.1(a) of the Rules of this Court.

Respectfully submitted,

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June 17, 1993

APPENDIX

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Reported at 988 F.2d 386

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3496

COCA-COLA BOTTLING COMPANY OF ELIZABETHTOWN, INC.; JACKSON COCA-COLA BOTTLING COMPANY; DIXIE COCA-COLA BOTTLING COMPANY, INCORPORATED; NEW BERN COCA-COLA BOTTLING WORKS, INC.; PLYMOUTH COCA-COLA BOTTLING COMPANY, INCORPORATED; OWENSBORO COCA-COLA BOTTLING COMPANY, INC.; SACRAMENTO COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY OF SHELBYVILLE, INC.; BEAVER COCA-COLA BOTTLING CO.; QUAKER STATE COCA-COLA BOTTLING COMPANY; THE CLEVELAND COCA-COLA BOTTLING COMPANY, INC.; KEYSTONE COCA-COLA BOTTLING COMPANY; CENTRAL COCA-COLA BOTTLING COMPANY, INC.; READING COCA-COLA BOTTLING WORKS; COCA-COLA BOTTLING COMPANY OF SHREVEPORT, INC. (formerly Star Bottling Works, Ltd.); THE COCA-COLA BOTTLING COMPANY OF FORT SMITH, a partnership; TEXARKANA COCA-COLA BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY; LAS CRUCES COCA-COLA BOTTLING COMPANY; WEST PLAINS COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF TUSCON, INC.; HATTIESBURG COCA-COLA BOTTLING

COMPANY; MAGNOLIA COCA-COLA BOTTLING COMPANY, INC.; COCA-COLA BOTTLING COMPANY OF TULSA, INC.; OUACHITA COCA-COLA BOTTLING COMPANY, INC.; NATCHEZ COCA-COLA BOTTLING CO., INC.; WICHITA COCA-COLA BOTTLING CO.; COCA-COLA BOTTLING CO. (NORTH DAKOTA); MARSHALL COCA-COLA BOTTLING CO. LIQUIDATING TRUST; PERMIAN COCA-COLA BOTTLING CO.; SCIOTO COCA-COLA BOTTLING CO.; RICHMOND COCA-COLA BOTTLING CO.; COCA-COLA BOTTLING CO. OF KENNETT (a partnership); COCA-COLA BOTTLING CO. OF JAMESTOWN; STREATOR COCA-COLA BOTTLING CO.; TEXAS COCA-COLA BOTTLING CO.; JEFFERSON CITY COCA-COLA BOTTLING CO.; COCA-COLA BOTTLING CO., INC., ALEXANDRIA, MN; DEMING COCA-COLA BOTTLING CO.; TRENTON COCA-COLA BOTTLING CO.; MACON COCA-COLA BOTTLING CO.; MARY LOUISE GOODRICH; MARY LOUISE KAY ROBINSON, individually and as trustee of the Kendall family inter vivos trust; ANN KAY HOBSON HAACK, individually and as trustee of the Kendall family inter vivos trust; JOHN K. HOBSON; MARGARET DODGE HOBSON, individually and as trustee of the Kendall family inter vivos trust (Subst. for Natchez Coca-Cola Bottling Co., Inc.); OLIVER C. HUTAFF, JR., as Trustee under Shareholders' Lawsuit Trust Agreement (Subst. for Wilmington Coca-Cola Bottling Works, Inc. and Kelford Coca-Cola Bottling Works, Inc.)

v.

THE COCA-COLA COMPANY, a Delaware corporation COCA-COLA BOTTLING CO. OF MT. PLEASANT; COCA-COLA BOTTLING CO. OF MUSKEGEON; COCA-COLA BOTTLING CO. OF DICKINSON; LOREDO COCA-COLA BOTTLING COMPANY, INC.,

Intervenors in D.C.

COCA-COLA BOTTLING COMPANY OF MAGNOLIA; SACRAMENTO COCA-COLA BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY OF ELIZABETHTOWN, INC. (also successor by merger to Coca-Cola Bottling Co. of Owensboro); COCA-COLA BOTTLING COMPANY OF SHELBYVILLE; TRENTON COCA-COLA BOTTLING COMPANY; PLYMOUTH COCA-COLA BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY OF DICKINSON; COCA-COLA BOTTLING CO. OF JAMESTOWN; COCA-COLA BOTTLING COMPANY OF WILLISTON; CLEVELAND COCA-COLA BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY OF LEHIGH VALLEY (formerly known as Bethlehem); LAREDO COCA-COLA BOTTLING COMPANY; CENTRAL COCA-COLA BOTTLING COMPANY; LOVE BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY OF LACROSSE; ARKANSAS-GEORGIA COMPANY (also known as Nashville); COCA-COLA BOTTLING COMPANY OF STREATOR; NATCHEZ COCA-COLA BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY OF JEFFERSON CITY; COCA-COLA BOTTLING COMPANY OF MACON; COCA-COLA BOTTLING COMPANY OF DEMING; COCA-COLA BOTTLING COMPANY OF TULSA; COCA-COLA BOTTLING COMPANY OF BROWNSVILLE (RGV); COCA-

COLA BOTTLING COMPANY OF SAN ANGELO; LAS CRUCES COCA-COLA BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY OF TUCSON; COCA-COLA BOTTLING COMPANY (ALEXANDRIA); COCA-COLA BOTTLING COMPANY OF MARSHALL; OLIVER C. HUTAFF, JR., as Trustee under Shareholders' Lawsuit Trust Agreement (Subst. for Wilmington Coca-Cola Bottling Works, Inc. and Kelford Coca-Cola Bottling Works, Inc.),

Appellants

No. 91-3498

COCA-COLA BOTTLING COMPANY OF ELIZABETHTOWN, INC.; JACKSON COCA-COLA BOTTLING COMPANY; DIXIE COCA-COLA BOTTLING COMPANY, INCORPORATED; NEW BERN COCA-COLA BOTTLING WORKS, INC.; PLYMOUTH COCA-COLA BOTTLING COMPANY, INCORPORATED; OWENSBORO COCA-COLA BOTTLING COMPANY, INC.; SACRAMENTO COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY OF SHELBYVILLE, INC.; BEAVER COCA-COLA BOTTLING CO.; QUAKER STATE COCA-COLA BOTTLING COMPANY; THE CLEVELAND COCA-COLA BOTTLING COMPANY, INC.; KEYSTONE COCA-COLA BOTTLING COMPANY; CENTRAL COCA-COLA BOTTLING COMPANY, INC.; READING COCA-COLA BOTTLING WORKS; COCA-COLA BOTTLING COMPANY OF SHREVEPORT, INC. (formerly Star Bottling Works, Ltd.); THE COCA-COLA

BOTTLING COMPANY OF FORT SMITH, a partnership; TEXARKANA COCA-COLA BOTTLING COMPANY; COCA-COLA BOTTLING COMPANY; LAS CRUCES COCA-COLA BOTTLING COMPANY; WEST PLAINS COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF TUSCON, INC.; HATTIESBURG COCA-COLA BOTTLING COMPANY; MAGNOLIA COCA-COLA BOTTLING COMPANY, INC.; COCA-COLA BOTTLING COMPANY OF TULSA, INC.; OUACHITA COCA-COLA BOTTLING COMPANY, INC.; NATCHEZ COCA-COLA BOTTLING CO., INC.; WICHITA COCA-COLA BOTTLING CO.; COCA-COLA BOTTLING CO. (NORTH DAKOTA); MARSHALL COCA-COLA BOTTLING CO. LIQUIDATING TRUST; PERMIAN COCA-COLA BOTTLING CO.; SCIOTO COCA-COLA BOTTLING CO.; RICHMOND COCA-COLA BOTTLING CO.; COCA-COLA BOTTLING CO. OF KENNETT (a partnership); COCA-COLA BOTTLING CO. OF JAMESTOWN; STREATOR COCA-COLA BOTTLING CO.; TEXAS COCA-COLA BOTTLING CO.; JEFFERSON CITY COCA-COLA BOTTLING CO.; COCA-COLA BOTTLING CO., INC., ALEXANDRIA, MN; DEMING COCA-COLA BOTTLING CO.; TRENTON COCA-COLA BOTTLING CO.; MACON COCA-COLA BOTTLING CO.; MARY LOUISE GOODRICH; MARY LOUISE KAY ROBINSON, individually and as trustee of the Kendall family inter vivos trust; ANN KAY HOBSON HAACK, individually and as trustee of the Kendall family inter vivos trust; JOHN K. HOBSON; MARGARET DODGE HOBSON, individually and as trustee of the Kendall family

inter vivos trust (Subst. for Natchez Coca-Cola Bottling Co., Inc.); OLIVER C. HUTAFF, JR., as Trustee under Shareholders' Lawsuit Trust Agreement (Subst. for Wilmington Coca-Cola Bottling Works, Inc. and Kelford Coca-Cola Bottling Works, Inc.)

v.

THE COCA-COLA COMPANY, a Delaware corporation

COCA-COLA BOTTLING CO. OF MT. PLEASANT; COCA-COLA BOTTLING CO. OF MUSKEGEON; COCA-COLA BOTTLING CO. OF DICKINSON; LOREDO COCA-COLA BOTTLING COMPANY, INC.,

Intervenors in D.C.

THE COCA-COLA COMPANY,

Appellant

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 81-00048)

Argued: March 10, 1992

PRESENT: HUTCHINSON, ALITO and HIGGINBOTHAM, *Circuit Judges*

(Filed February 17, 1993)

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

These consolidated appeals are from orders the United States District Court for the District of Delaware entered in one of three related actions[1] concerning the contracts between The Coca-Cola Company (the Company) and some of its bottlers who have persisted in refusing the Company's proposed amendments to its agreements to supply the bottlers' requirements of Coca-Cola bottling syrup.[2] In the appeal at our Docket No. 91-3496, eighteen bottlers of the soft drink known as

1. Two of these actions, *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, C.A. No. 83-95, and *Alexandria Coca-Cola Bottling Co. v. Coca-Cola Co.*, C.A. No. 83-120 (collectively referred to as the "*diet Coke*" cases), 769 F. Supp. 671 (D. Del. 1991), arise from disputes involving introduction by the Company of its new diet product, diet Coke, in 1983. An appeal of the *Shreveport* case is the subject of our companion opinion in *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, No. 91-3497 (3d Cir. ____ xx, 1993). There was no appeal in the *Alexandria* case.

2. For shortened reference, citations to the published opinions of the district court in this case will be as follows: *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 95 F.R.D. 168 (D. Del. 1982) (*Coke I*); *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 98 F.R.D. 254 (D. Del. 1983) (*Coke II*); *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 654 F. Supp. 1388 (D. Del. 1986) (*Coke III*); *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 654 F. Supp. 1419 (D. Del.

Coca-Cola appealed an order of the United States District Court for the District of Delaware dismissing their amended Count Two claim for declaratory and injunctive relief.[3] The relief sought would have required the Company to supply them

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1987) (*Coke IV*); *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 668 F. Supp. 906 (D. Del. 1987) (*Coke V*); *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 696 F. Supp. 57 (D. Del. 1988) (*Coke VI*); *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 769 F. Supp. 599 (D. Del. 1991) (*Coke VII*).

3. The bottlers who were plaintiffs in *Coke VII* and participate in this appeal are as follows, with their state of incorporation or principal place of business indicated in parentheses. Those who are also participating in the appeal of *diet Coke VII* are signified by an asterisk:

> Coca-Cola Bottling Co. of Magnolia (AK)*, Sacramento Coca-Cola Bottling Co. (CA)*, Coca-Cola Bottling Co. of Elizabethtown (KY)*, Coca-Cola Bottling Co. of Shelbyville (KY)*, Trenton Coca-Cola Bottling Co. (MO), Kelford Coca-Cola Bottling Co. (NC)*, Plymouth Coca-Cola Bottling Co. (NC)*, Wilmington Coca-Cola Bottling Works (NC)*, Coca-Cola Bottling Co. of Dickinson (ND)*, Coca-Cola Bottling Co. of Jamestown (ND)*, Coca-Cola Bottling Co. of Williston (ND)*, Cleveland Coca-Cola Bottling Co. (OH), Coca-Cola Bottling Co. of LeHigh Valley (PA), Laredo Coca-Cola Bottling Co. (TX), Central Coca-Cola Bottling Co. (VA), Love Bottling Co. (OK)*, Coca-Cola Bottling Co. of LaCrosse (WI)*, Arkansas-Georgia (AK), Coca-Cola Bottling Co. of Streator (IL), Natchez Coca-Cola Bottling Co. (MS)*, Coca-Cola Bottling Co. of Jefferson City (MO), Coca-Cola Bottling Co. of Macon (MO), Coca-Cola Bottling Co. of Deming (NM), Coca-Cola Bottling Co. of Tulsa (OK)*, Coca-Cola Bottling Co. of Brownsville (TX), Coca-Cola Bottling Co. of San Angelo (TX)*, Las Cruces Coca-Cola Bottling Co. (NM)*, Coca-Cola Bottling Co. of Tucson (AZ)*, Coca-Cola Bottling Co. (Alexandria) (MN), and Coca-Cola Bottling

with Coca-Cola syrup (herein the syrup) sweetened with high-fructose corn syrup (HFCS) under contracts that license them to market bottled Coca-Cola in a particular territory. Their licenses had their roots in the terms of an 1899 national franchise the Company had granted the predecessor of the bottlers' licensors. That franchise was, however, amended from time to time and ultimately modified by agreements incorporated into two 1921 Consent Decrees (herein Consent Decrees) which settled a 1920 dispute between the Company and the bottlers' licensors.

In its cross-appeal at Docket No. 91-3498, the Company challenges the order of the district court awarding a total of $20,742,398.20 in compensatory damages and prejudgment interest for breach of contracts to the eighteen bottlers who continue to seek injunctive relief in No. 91-3496 and twelve other bottlers who formerly bottled and distributed Coca-Cola (herein the "former bottlers"). These thirty bottlers claimed in Count One of their complaint that the Company had breached its contractual obligations to them when it unilaterally substituted syrup sweetened with the cheaper HFCS for syrup sweetened with the more expensive cane or beet sugar they claim that the Consent Decrees require. The Consent Decrees followed a 1920 law suit the bottlers' licensors brought against the Company, after World War I fluctuations in the supply and price of cane sugar,

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Co. of Marshall (TX)*.

Coke VII, 769 F. Supp. at 605-06; *diet Coke VII*, 769 F. Supp. 671, 679-80 (D. Del. 1991).

then the exclusive sweetener used for the syrup, ignited a heated dispute between the parties. The bottlers' individual contracts are similar in all material respects and their terms derive their meaning from the 1899 contract, as ultimately modified by the Consent Decrees.

The primary issue in the appeal of the bottlers at No. 91-3496 and the Company's cross-appeal at No. 91-3498, as well as the companion appeal at No. 91-3497 of another somewhat overlapping set of bottlers who claim entitlement to diet Coke syrup, is what type of syrup the Company is contractually obligated to provide its bottlers under the bottling contracts derived from the 1899 franchise, as amended and ultimately modified by the Consent Decrees. The district court held that two key terms in the Consent Decrees, "sugar" and "syrup," were ambiguous and, after evidential hearings, interpreted sugar in the light of the parties' practices over the years. The district court's findings concerning the meaning the parties intended to give the term "sugar" are the subject of *Coke III* and its findings concerning the parties' intent in using the term "syrup" are made in *Coke VII*.

In amended Count Three of their complaint, the bottlers sought additional damages because, they claimed, the Company overpriced the naturally sweetened syrup it was selling to them by determining the market price for sugar contrary to the pricing formula the Consent Decrees set for syrup. In Count Four, the bottlers claimed a share of monies the Company received in settlement of

an antitrust action it had brought against the major refiners of sugar.[4]

We hold that the district court did not err in determining that the Consent Decrees and the resulting contracts with the bottlers covered only syrup sweetened with 5.32 pounds per gallon of cane or beet sugar. We will therefore affirm the district court's order dismissing the bottlers' demands for syrup sweetened with HFCS. We also agree with the district court that the Company breached its contracts with the bottlers when it began unilaterally supplying them with syrup sweetened with HFCS. Nevertheless, because the HFCS-sweetened syrup was comparable in all material respects to the syrup made with 5.32 pounds per gallon of cane or beet extracted sugar, we also hold that the bottlers have not shown that they suffered any loss of economic expectancy as a result of this breach. Therefore, the district court's award of compensatory damages to the bottlers on Count One of their complaint, including its award of pre-judgment interest, will be vacated and the case remanded with instructions to substitute therefor an award of $1.00 in nominal damages to each of the bottlers who are cross-appellees at our Docket No. 91-3498. In all other respects we will affirm the orders of the district court.

I.

A.

4. The vast majority of the bottlers who once operated under the contracts as amended by the Consent Decrees have already agreed to terms under an amendment the Company first offered in 1978. The parties to these appeals have refused to accept that offer.

The history of Coca-Cola is essential background to our analysis of this case.[5] The story begins in 1886 when an Atlanta pharmacist, Dr. John Smyth Pemberton, developed the formula for Coca-Cola. Soon afterward, Asa G. Candler, also a pharmacist and the owner of a wholesale drug company, purchased an interest in the formula and the trademark and formed the Company to manufacture and market Coca-Cola syrup to drugstores for use in a fountain beverage.

In 1899, two Chattanooga lawyers, B.F. Thomas and J.B. Whitehead, bought the rights to receive Coca-Cola syrup at a fixed price for vending in "bottles or other receptacles" throughout the United States with the exception of Connecticut, Maine, Massachusetts, Mississippi, New Hampshire, Rhode Island, Texas and Vermont. Thomas and Whitehead also received the exclusive right to use the trademark "Coca-Cola" on bottles in the territories covered by the contract. The bottling rights the Company conveyed to Thomas and Whitehead were exclusive, not only of all other potential bottlers, but also of the Company itself, which reserved only the exclusive right to distribute its syrup for use at soda fountains in non-bottled soft drinks and to manufacture bottling syrup for sale to Thomas and Whitehead. As part of the deal, Thomas and Whitehead agreed to buy their requirements for Coca-Cola bottling syrup from the Company. Under these exclusive bottling contracts (the 1899 Contracts), Whitehead

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5. For greater detail concerning the historical facts of this litigation, the reader is referred to *Coke VII*, 769 F. Supp. at 606-13, and *Coke VI*, 696 F. Supp. at 61-68. This statement of facts is drawn, at times verbatim, from these opinions.

and Thomas agreed to "establish in the city of Atlanta, as soon as the necessary machinery and buildings can be obtained, a bottling plant for the purpose of bottling a mixture of Coca-Cola syrup preparation with carbonic acid and water." *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 269 F. 796, 800 (D. Del. 1920) (*Coke 1920*) (quoting 1899 contract).

Thomas and Whitehead formed the "Coca-Cola Bottling Company," a Tennessee corporation, in December 1899. Shortly after its formation, they decided to assign some of their rights under the 1899 contract to outside bottlers. Thomas and Whitehead soon disagreed about the terms of the contracts between their company and the bottlers who would actually bottle Coca-Cola. They decided to divide the Coca-Cola bottling business and go their separate ways. Thomas retained the original Tennessee bottling company (the "Thomas Company") and an exclusive territory for the business of bottling Coca-Cola in approximately fifteen states. The exclusive right to bottle Coca-Cola in the remaining states that were the subject of the grant from the Company went to Whitehead. Whitehead and a new partner, J.T. Lupton, also named their bottling company "The Coca-Cola Bottling Company." To avoid confusion, we will call it the "Whitehead-Lupton Company." The 1899 Contract with the Company for the supply of bottling syrup was amended to reflect this separation.

As consumer demand for bottled Coca-Cola escalated, the two new bottling companies found themselves unable to meet it. In order to fulfill their obligations under the contract, they again subdivided their territories and entered into

licensing contracts with bottlers who bottled, promoted, and sold Coca-Cola out of their own bottling plants in various exclusive territories assigned to them. The Thomas Company and the Whitehead-Lupton Company, the "parent bottlers," became largely licensors of the exclusive right that the Company had given them to market bottled Coca-Cola. Their licensees, the actual bottlers, performed the tasks of manufacture, shipment, and bottling.[6] The parent bottlers' primary functions became the recruiting of actual bottlers to meet the rising demand for bottled Coca-Cola and continued expansion of the market for that product.

In 1919, a banking syndicate purchased the Company. The syndicate converted it into a Delaware corporation which assumed the old Georgia company's previous obligations to the parent bottlers. It did not directly contract with the parent's licensees, the actual bottlers of Coca-Cola. One year later, in 1920, smoldering tensions between the Company and the bottlers over the content and pricing of the syrup erupted into litigation, prosecuted primarily by the parent bottlers.

B.

The 1920 litigation, like the World War that engendered it, led only to a prolonged armistice. In order to understand the impact of the 1920 litigation on the current dispute, it is helpful to set out several changes that were made in the

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6. The bottlers who are parties to this appeal and cross-appeal, as well as those who are parties to the diet Coke appeal, are actual bottlers.

formula for Coca-Cola bottling syrup between 1899 and 1920. Prior to 1906, the syrup was sweetened with a combination of sugar and saccharin. In 1906, Congress passed the Pure Food and Drug Act, following which the Company began using granulated sugar, in lieu of saccharin which was banned by the Act. Refined granulated sugar, a form of sucrose, became the most expensive ingredient used in the manufacture of the syrup. Accordingly, the parent bottlers and their licensees agreed to an increase in the price of syrup to reflect the higher cost attendant on the use of cane sugar as the sole sweetener for Coca-Cola bottling syrup. A second change was the introduction of different formulae for fountain syrup and bottlers' syrup. This change resulted in the Company's use of more sugar in bottlers' syrup than in fountain syrup.

World War I severely affected the sugar market and, with it, the Company's cost of producing syrup. Among other things, the war brought rigid price controls and rationing. The Company and its bottlers were permitted to buy only fifty percent of their sugar requirements. The removal of price controls at the end of the war, combined with a continuing shortage of sugar, produced a three-fold rise in the price of sugar, from nine cents a pound in September 1919 to over twenty-seven cents a pound in June 1920. Sugar rationing during the war had, in the meantime, spurred experimentation with sweeteners other than the sucrose obtained by refining cane or beet sugar. A division of the United States Department of Agriculture tested corn syrup and corn sugar for suitability as substitutes for conventional granulated sugar and concluded that the

substitutes "[could] be used to replace one-fourth to one-half of the amount of sugar ordinarily used [in soft drinks], thereby effecting a saving of approximately 50,000 tons of sugar a year." *Coke VI*, 696 F. Supp. at 63 (quotation omitted). At approximately the same time, the Company began substituting corn syrup for sugar in order to attempt to meet demand, but the bottlers found that the use of the corn syrups then available adversely affected the quality of their product.

C.

In 1919, because of the wartime rise in sugar prices, the parent bottlers agreed to permit the Company to pass on sugar price increases in excess of nine cents per pound. The Company was not satisfied. In 1920, it sought new contracts with the parent bottlers that would allow it to raise syrup prices on the basis of all its costs in manufacturing Coca-Cola bottling syrup. The bottlers were unwilling to agree to such a cost plus contract unless the Company gave them the right to obtain information on its manufacturing costs. The Company was unwilling. Instead, it stood on "the integrity and good faith of The Coca-Cola Company." *Coke VII*, 769 F. Supp. at 609. The parent bottlers then rejected the Company's proposal for flexible pricing. Stung by this rejection, the Company informed the parent bottlers that its contracts with them were terminable at will. The parent bottlers replied with a demand that the Company acknowledge that their contracts were perpetually binding. The Company responded with a notice that the parent bottlers' contracts would be terminated as of May 1, 1920.

The two principal parent bottlers, the Thomas Company and the Whitehead-Lupton Company, filed suit against the Company in Georgia. The suit was shortly withdrawn and refiled in the United States District Court for the District of Delaware on June 1, 1920. The parent bottlers sought to enjoin the Company from terminating their contracts. Six actual bottlers from the Whitehead-Lupton territory intervened in their support. What occurred during the pendency of that litigation is described in *Coke III*, 654 F. Supp. at 1394-95:

> On June 10, 1920, the parties to the Delaware litigation agreed to entry of an order requiring the Company to supply the parent bottlers' and actual bottlers' requirements of Coca-Cola Bottlers Syrup during the pendency of the litigation. Under the terms of the Order, the price of the syrup paid by the actual bottlers to the parent bottlers was fixed at $1.72 per gallon for 5 months (until November 1, 1920), by which time it was anticipated a final decision on the applications for interlocutory injunctions would have been rendered. The Order further provided that if the final decision had not issued by November 1, 1920, the syrup price would be increased or decreased from the $1.72 level based upon increases or decreases in the Company's actual costs of manufacture of the syrup.
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> During the negotiations leading to the June 10 Order, it appears the Company failed to disclose fully that it had entered into substantial long-term sugar contracts at prices near the top of the market. The bottlers were given to

understand, from representations made in an affidavit filed on June 7, 1920 by Charles H. Candler, then Chairman of the Board of The Coca-Cola Company, that the Company had favorable long-term sugar contracts "very much lower than the present market price." Charles Rainwater, in a letter to Candler dated January 14, 1921, recollected Candler's statements to the bottlers:

> [Y]ou represented that The Coca-Cola Company had but one written contract, which expired in about three weeks, and one verbal contract, under which the market price each Monday morning was controlling.

Although the price of sugar dropped steadily from its peak in June, 1920, the price of syrup to the parent and actual bottlers under the June 10, 1920 Order remained fixed. Thus, while competing soft-drink prices fell, the retail price of Coca-Cola remained high. Actual bottlers suffered a loss in sales volume. The Chairman of The Coca-Cola Company reported that the Company's total sales volume of syrup (which included both bottle and fountain syrup) declined 53% in September, 1920 and 50% in October, 1920, because of the high price of syrup.

The bottlers expected relief on November 1, based on their understanding of the Company's sugar contracts. Instead, with the market price of sugar continuing to fall, the Company announced a price increase for its syrup in November, 1920, in order to recoup the cost of its inventories of high-priced sugar. The

Company also announced price increases in December, 1920, and January, 1921. The bottlers by agreeing in the June 10 Order to a price for syrup based upon the Company's total manufacturing cost quickly discovered they had unwittingly exposed themselves to and insulated the Company from the hazards of the marketplace. The Company required the bottlers to pay for the Company's poor judgment in overpurchasing high-priced sugar, while it continued to receive fixed profits per gallon of syrup. Both The Coca-Cola Company and especially the actual bottlers found themselves in a precarious economic position while maintaining an increasingly antagonistic negotiating posture.

The Company represented its costs of manufacture under the June 10 Order had increased because of long-term sugar contracts at high prices. The parent bottlers, in disbelief, demanded verification of the Company's figures. The bottlers' audit revealed discrepancies, and the Company and the parent bottlers were unable to reconcile their figures or even agree on items of overhead to be included in the cost calculation. When the Company in January 1921 announced an estimated February cost of manufacture of $1.85, the bottlers took new action. In February, a parent bottler and actual bottlers filed supplemental complaints accusing the Company of fraud in the negotiation of and operation under the Order and sought appointment of a special master to determine the syrup cost under the terms of the Order.

Id. (citations omitted).

In *Coke 1920*, the district court granted the parent bottlers' motions for preliminary injunctions, declaring that their contracts with the Company were perpetual and that the Company had sold them property rights in the bottling of Coca-Cola. *See Coke 1920*, 269 F. at 816. The Company appealed the decision to this Court. On July 6, 1921, while the appeal was pending, the Company executed separate settlement agreements with both the Whitehead-Lupton Company and the Thomas Company. The district court formally incorporated those agreements into Consent Decrees on October 4, 1921.[7]

The Consent Decrees amended and clarified the contracts between the Company and the parent bottlers. Paragraph One of the settlement agreement so incorporated declared "that the primary obligation of all parties hereto, as well as all other individuals and Bottling Companies who employ the name Coca-Cola . . . is to promote the sale of Coca-Cola." Joint Appendix (App.) at 4415.

Paragraph Two memorialized the parties' agreement that the original contracts between them "shall remain of full force and effect" and "be perpetual," except as "modified" herein, and provided that the parent bottlers must obtain the consent of the Company to an assignment made under the contract. *Id.*

Paragraph Five fixed the price of syrup to be offered by the Company to the parent bottlers at

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7. The decrees incorporating the settlement agreements are identical for all practical purposes on this appeal. The settlement agreement between the Company and the Thomas Company is reproduced in pertinent part in the Appendix to this opinion.

$1.17½ per gallon, and established a formula to accommodate changes in the price of sugar. The parties designed the pricing formula so that upward changes in it would be triggered when the market price of sugar rose more than seven cents per pound over the price prevailing at the time the settlement was made. For every one cent increase in the price of sugar above the seven cents per pound increase, the bottlers agreed to pay six additional cents per gallon of syrup.[8] The pricing formula was "to include all possible increases in the cost of producing such syrup" by the Company, other than those resulting from arbitration.[9] *Id.* at 4417.

Paragraph Six obliged the parent bottlers to sell syrup to the actual bottlers at a maximum current price of $1.30 per gallon, "[i]n order to promote the sale of Coca-Cola and enable the actual bottlers to compete with other beverages." *Id.* It also provides that the initial $1.30 per gallon price of syrup to the actual bottlers would increase by six cents per gallon for every one cent per pound increase in the market price of sugar over and above an initial seven cents per pound increase. *Id.* This provision is similar to Paragraph Five of the Consent Decree which requires a similar

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8. The price would rise on the same basis in the event of a fractional advance in the price of sugar. For example, if the price of sugar rose from seven cents to seven and one-half cents per pound, the price of syrup would also rise from $1.17½ to $1.23½ per gallon.

9. The arbitration provisions are set out in paragraphs 3, 12 and 13. The parties to this case and the diet Coke case have eschewed arbitration.

increase in the price of syrup to the parent bottlers.

Paragraph Seven provides a method for calculating the market price of sugar. The parties agreed that sugar's market price would be determined quarterly, the first seven days of each quarter, "by averaging the market price of standard granulated sugar . . . as quoted at [the ten largest domestic refineries]." *Id.* at 4417-18.

Paragraph Ten contains the Company's promise that "the syrup sold and furnished by it to the party of the first part [the parent bottlers] is to be high grade standard Bottlers Coca-Cola Syrup." *Id.* at 4420. Paragraph Ten also provides that the syrup furnished to the bottlers "shall contain not less than five and thirty two one hundredths (5.32) pounds of sugar to each gallon of syrup." *Id.*

The 1899 agreement between Thomas and Whitehead and the Company, as amended by the 1921 Consent Decrees, does not give any precise definition of the Coca-Cola syrup that is to be supplied, and neither the bottlers who are parties to this case concerning natural sweeteners, nor those who are parties to the diet Coke case, contend on appeal that the term syrup as used in the Company's agreement with the parent bottlers adds anything to the 1921 agreement's description of the syrup in terms of its sugar content. The bottlers in the instant case do argue, however, that the required "standard" Coca-Cola bottling syrup mentioned in Paragraph Ten of the Agreement is the HFCS-sweetened syrup because that is the syrup the Company now provides to approximately ninety-seven percent of its bottlers.[10]

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10. As discussed *infra*, most of these bottlers accepting HFCS

D.

By 1975 the Company had acquired the parent bottlers and assumed their obligations to their licensees, the actual bottlers. In 1978, the Company proposed to amend its bottlers' contracts to substitute a new pricing formula for its syrup (the "1978 Amendment"). The new formula continued to use a "sugar element" as the "base element" but added a factor based on the Consumer Price Index, instead of the "market price" of sugar. As discussed *supra*, the impetus for the "market price" term in the Consent Decrees came from the bottlers' disastrous experience with the Company's sugar purchases following World War I and during the first several months of the 1920 litigation. Tying the syrup price to the market price of sugar served the dual purpose of transferring the economic risks associated with long term sugar purchases from the bottlers to the Company and of providing an objectively verifiable price for the cost of sugar. *Coke III*, 654 F. Supp. at 1408.

Even in the period immediately following the entry of the Consent Decrees, the parties disagreed over whether the syrup should be priced at the "quoted" or "list" price, or at the actual selling price. This disagreement went unresolved. The Company's practice at that time, however, as reflected in a 1956 memorandum from C.W. Hodgson, Company Vice-President to the head of the Company's Purchasing Department (hereinafter "Hodgson Memorandum"), was to use the actual

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are no longer parties to this case since they have agreed to the Company's proposed 1978 amendment to their contracts.

selling price rather than the higher list price. *Id.* at 1416. The Company determined actual selling prices through inquiries of the refiners. In 1969, the Company discontinued this practice and began using the refiners' official list prices to calculate the market price.

In January 1980, the Company started using a new, cheaper sweetener, HFCS, in place of the sucrose contained in refined, granulated cane or beet sugar. HFCS is made "by hydrolysis of corn starch by chemical enzymes." *Coke VI*, 696 F. Supp. at 67 (quotation omitted). At first, HFCS constituted fifty percent of the sweetener used in the syrup, but eventually the Company eliminated sucrose entirely.

The 1978 amendment "also contained a provision that in the event the Company modified the formula of Coca-Cola Bottlers Syrup to replace sugar with 'another sweetening ingredient,' the resulting savings would be passed through to amending bottlers." *Coke III*, 654 F. Supp. at 1395. From 1978 until 1987, when the Company withdrew it, most of the bottlers accepted the proposed 1978 amendment and had their contracts modified accordingly. Out of an original group of 102 bottlers, only forty-two remained in this case by the time the class issues were tried in 1983 and, as stated, only thirty participate in this appeal. *See supra* n.3. Eighteen of these thirty participating bottlers continue to buy syrup for bottled Coca-Cola under the original contracts as modified by the Consent Decrees or contracts that closely resemble those original agreements. They seek both damages and injunctive and declaratory relief. The other twelve have sold or abandoned their contracts and seek only damages for breach.

For a time, the Company sold HFCS-sweetened syrup to both those bottlers who had accepted the 1978 amendment it proposed and the bottlers who insisted on operating under the 1921 agreements. The bottlers who agreed to amend their contracts received a "pass-through" of the savings to the Company from the use of HFCS, which is cheaper than the sucrose that is obtained from cane or beet sugar. The bottlers who refused to amend their contracts did not receive that particular price advantage. Despite the pass-through provision, the bottlers with amended contracts pay a higher price for syrup, due at least in part to the amended contracts' inclusion of promotional costs in the syrup's price base, a cost not included in the 1921 agreement's pricing formula. *See Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 563 F. Supp. 1122, 1126 n.14 (D. Del. 1983).

II.

The bottlers filed the present actions in 1981 following the Company's 1980 decision to substitute HFCS for granulated sugar in the syrup for bottled Coca-Cola. The parties' differences concern the nature of Coca-Cola's bottling syrup and the appropriate price for HFCS, as well as alleged pre-existing and continuing overcharges for syrup.[11]

A.

As stated, the thirty bottlers who remain in this case are now, or once were, engaged in bottling

11. Again, for fuller details on the genesis of this litigation, the reader is referred to *Coke VII*, 769 F. Supp. at 604-606 and *Coke VI*, 696 F. Supp. at 68-71. This Part II of our opinion again draws from those opinions, at times verbatim.

Coca-Cola under contracts which conform to the Consent Decrees issued in 1921. In amended Count One of their complaint, all thirty seek damages claiming the Company breached their contracts by unilaterally supplying them with HFCS sweetened syrup instead of sugar-sweetened syrup. During the course of the litigation, twelve of these bottlers either amended their bottling contracts as Coca-Cola requested or sold their rights to bottle Coca-Cola to bottlers who operate under amended bottling contracts. These twelve bottlers now seek only past damages under amended Count One and have no remaining claims under Count Two in which the remaining eighteen bottlers seek declaratory and injunctive relief requiring the Company to supply them with fructose-based syrup.

In Count One of their complaint, the bottlers had originally sought to enjoin the Company from providing it with HFCS-sweetened syrup and only alternately sought a "pass through" of the savings the Company realized by using HFCS in place of sugar. In 1986, faced with claims by some of the bottlers that this violated their contracts, the Company announced that it would henceforth supply the bottlers who refused the 1978 amendment with syrup sweetened with the cane or beet sugar which they claimed they had a right to.

Presented with the Company's new policy of providing sucrose-sweetened syrup, the bottlers reversed position and asked to amend their complaint to add a claim that they were entitled to HFCS syrup. *See Coke V*, 668 F. Supp. at 922 (allowing leave to allege "an additional breach of the Consent Decrees and Bottler's Contracts based

on the Company's decision in March, 1987 to supply sucrose syrup to unamended bottlers"). In their original complaint, the bottlers had also included as Count Two a claim for restitution based on the benefit the Company realized from use of the cheaper HFCS syrup. The bottlers abandoned any claim to restitution as untenable and were allowed to substitute, as amended Count Two, their claim of contractual entitlement to HFCS-sweetened syrup. Because the bottlers no longer wanted sugar-sweetened syrup, they also amended Count One of their original complaint by eliminating its prayer for equitable relief and limiting themselves on that claim to damages for breach of contract in the form of a pass-through of the savings the Company realized by using the cheaper HFCS syrup. *Id.*

The bottlers apparent about face had a compelling business rationale. Over ninety-seven percent of all bottlers had accepted the 1978 amendment the Company proposed and now use an HFCS-sweetened syrup. *Id.* at 909; *see also Coke VII*, 769 F. Supp. at 646. Before the introduction of HFCS syrup, many of the bottlers had formed cooperatives in order to reduce the cost of bottling. After the Company's 1987 decision to supply the bottlers who had refused the 1978 amendment with sugar-sweetened syrup, it "notified the [cooperatives] . . . that the Company's Beverage Quality Assurance Department would develop and forward procedures for segregating HFCS-sweetened syrup from sucrose-sweetened syrup." *Coke VII*, 769 F. Supp. at 644.[12] The

12. These quality control procedures were directed at bottlers who would be packaging both HFCS-sweetened syrup and

bottlers who continued to resist the Company's proposal to supply HFCS syrup and received the sugar-sweetened syrup now incurred additional costs when they sought to have their syrup bottled by these cooperatives. Faced with the rising costs attendant to the Company's new quality control procedures, the bottlers asked and were granted leave to amend their complaint to include the present version of Count Two, claiming entitlement to HFCS-sweetened syrup.

B.

As so amended, the bottlers' complaint continues to have four counts. Count One now seeks damages for breach of contract said to result from the Company's unilateral decision to supply

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sucrose-sweetened syrup. These bottlers were required to:

> (1) place orders for sucrose-sweetened syrup at least five days in advance; (2) thoroughly rinse the syrup storage system (hose, pumps, lines and tanks) before unloading sucrose-sweetened syrup into a tank which previously contained HFCS-sweetened syrup (no rinse is required, however when HFCS-sweetened syrup is placed into tanks formerly containing sucrose-sweetened syrup); (3) thoroughly rinse the system's syrup lines, proportioning, cooling, carbonating, beverage lines and filler to remove all traces of HFCS-55 syrup when packaging sucrose-sweetened syrup after using the same equipment to package HFCS-sweetened syrup (but not vice versa); (4) keep finished products sweetened with HFCS and sucrose separate and designated by type; and (5) maintain records of syrup batch codes, date of product, shipping date, package date, code and identity of recipient bottler.

Coke VII, 769 F. Supp. at 644. The parties do not now directly question the Company's right to impose these restrictions.

the cheaper HFCS syrup to the bottlers who had refused amendment without a "pass through" of the savings that the Company realized when it substituted HFCS-sweetened syrup for sucrose-sweetened syrup in its sales to the bottlers. The bottlers argue that the Consent Decrees and their individual contracts with the Company entitle them to sugar-based syrup and that the damages suffered can be measured by the difference between the cost of sucrose-sweetened syrup and the cost of the cheaper HFCS syrup (the savings realized by the Company in light of the breach).

Only the eighteen bottlers who persist in their refusal to sign amended contracts are involved in Count Two. In it, they seek an injunction and declaratory relief that would require the Company to provide them with HFCS-sweetened syrup. They argue that under the Consent Decrees the Company promised to provide them with "standard syrup" and that the Company's subsequent course of conduct in introducing and expanding the use of HFCS-sweetened syrup has redefined the "standard syrup" as HFCS syrup. Therefore, they contend that the Company must provide the same HFCS syrup that all the bottlers with amended contracts now receive, at cost plus a mark-up equivalent to mark-up above sucrose prices specified in the Consent Decrees and the individual contracts informed by those Consent Decrees.[13]

In Count Three, the bottlers claim that the Company erroneously calculated the market price

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13. Count Two, as amended, also included a punitive damages claim which the district court did not consider because of its disposition of amended Count Two.

on which the Consent Decrees required the Company to base its charges for the sugar-based syrup. The bottlers claim that market price means the lowest actual prices made known by sugar refiners to purchasers. The Company claims that market price means the generally higher "official list prices" issued by the sugar refiners.

Finally, in Count Four, the bottlers seek recovery of a portion of a $4,300,000.00 award the Company received under a settlement agreement it made with the major sugar refiners against whom it had claimed antitrust violations. The bottlers claim that they are injured parties entitled to share in that recovery with the Company.

C.

In *Coke I*, the district court denied the bottlers' motion for class certification, holding that the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a) were not satisfied because as many as thirty-two different states' laws could be involved and different courses of dealing peculiar to individual bottlers would have to be considered. *Coke I*, 95 F.R.D. at 175-79.

The district court also held that the plaintiffs lacked standing to enforce the Consent Decrees because the bottlers were not parties to the Consent Decrees entered into between the parent bottlers and the Company. *Id.* at 175 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) (nonparties to consent decrees may not directly enforce those judgments "even though they were intended to be benefitted by [them]")).

The district court's second opinion, *Coke II*, arose out of an order granting reargument on some of the issues considered in *Coke I*. Following

reargument, the district court reversed itself on the denial of class certification and vacated its holding denying the bottlers standing to enforce the Consent Decrees. With respect to class certification, the court concluded that because:

> the meaning of certain provisions of the Consent Decrees regarding the pricing and composition of Bottler's Syrup . . . will affect all or a significant number of the putative class members, the plaintiff has satisfied the commonality requirement of Rule 23(a)(2).

Coke II, 98 F.R.D. at 265 (footnote omitted). It also reassessed the typicality question and decided that some, but not all, of the issues involved with the proposed representative's claims would be typical of those of the putative class members. *Id.* at 266-67. The district court then certified two issues as appropriate for class consideration: the meaning of the term "sugar" and the meaning of the term "market price" in the Consent Decrees. *Id.* at 268.

In *Coke II*, the court also withdrew its *Coke I* standing holding after concluding "the Court need not have decided these issues in that they were not necessary for a determination of the class certification motion then before the Court." *Id.* at 264. *Coke II* left the standing issues to "be addressed when and if a decision is necessary for the proper adjudication of this case." *Id.*

Coke III is of central importance to this appeal. In that opinion, after trial of the two certified class issues, the district court set forth its findings of fact and conclusions of law. On the first certified issue, the court determined that the term "sugar" as used in the Consent Decrees meant "refined granulated sucrose from cane" and refined

granulated sucrose from beets. *Coke III*, 654 F. Supp. at 1406. The court included cane sugar by virtue of the express language in the Consent Decrees and sugar made from beets based on the parties course of conduct, *i.e.*, the fact that the Company had, with the bottlers' knowledge, used beet sugar since 1941 without objection from the bottlers. *Id.* at 1403, 1406.

Finally, in *Coke III*, the district court recognized that one of the objectives of the Consent Decrees was to protect the bottlers' competitive posture. *Id.* at 1407-08. It then defined "market price" as follows:

> "Market price" as used in paragraph 7 of the Consent Decrees means an average of the price per pound for refined granulated sugar of the grade and in the packaging unit in which it is principally sold to industrial users f.o.b. the refinery, as made known to such industrial users upon inquiry prior to sale by the ten refineries in the United States with the largest capacity and output during the first seven days of each calendar quarter, less any discounts, allowances, or rebates from that price which are available to industrial users or are made known to them upon inquiry prior to sale, but not including a standard two percent cash discount or any individually negotiated discounts, allowances or rebates.

Id. at 1418.

Coke IV dealt primarily with the bottlers' motion for summary judgment on the reopened issue of their standing to enforce the Consent Decrees; however, the district court also denied the Company's motion to amend the findings made in

Coke III and the bottlers' motion to certify *Coke III* as final for appeal. *Coke IV*, 654 F. Supp. at 1429, 1448. Revisiting the issue whether any bottlers who had refused to amend their contracts could directly enforce the Consent Decrees as parties, the district court held that bottlers from the former Whitehead-Lupton territory who could trace their contractual rights to a member of the intervenor class in *Coke 1920* had standing, but the bottlers whose contracts were derived from the Thomas Company lacked standing since the actual bottlers from the Thomas territory never intervened in *Coke 1920*. *Id.* at 1436-37. The district court, however, did not then determine which of the bottlers who remained as plaintiffs traced their rights to the Whitehead-Lupton Company. *See id.* at 1433-37, 1445.

Coke V followed the Company's announced decision to stop supplying HFCS-sweetened syrup to the bottlers who had refused to amend their contracts. In *Coke V*, the district court entered an order granting the bottlers leave to amend their complaint to seek an injunction against the Company's proposed return to cane or beet sugar. *Coke V*, 668 F. Supp. at 908.

As discussed *supra*, the factual theory behind the bottlers' demand for HFCS-sweetened syrup, instead of sugar-sweetened syrup, was that HFCS-sweetened syrup had become "standard Bottlers Coca-Cola Syrup." *Id.* at 915. Therefore, the Company's threatened action to limit them to sugar-sweetened syrup breached its implied duty of good faith. Although the district court granted the bottlers' motion to amend Count One of the complaint to limit relief to the savings pass-through and to file the supplemental pleading

as new Count Two, it denied the bottlers' motion for a preliminary injunction against the return to a sucrose-based syrup because the bottlers had not shown a reasonable likelihood of success on the merits of their new claim that the Company had breached its implied duty of good faith. *Id.* at 921-23.

In *Coke VI*, the Company moved for summary judgment and the bottlers moved to intervene in the 1920 litigation between the Company and the parent bottlers in an effort to alter the Consent Decrees. *Coke VI*, 696 F. Supp. at 60. In addition, in *Coke VI*, the court disposed of the bottlers' Count Four claim to a share in the proceeds of the antitrust settlement by dismissing it on the merits, following the parties' agreement that it could be decided on a paper record. *Id.* at 87, 90.

The district court first ruled that the Company owed no fiduciary duty to the bottlers. *Id.* at 75. Because no award of punitive damages may be sustained in the absence of a breach of fiduciary duty beyond the implied duty of good faith and fair dealing, this ruling disposed of the bottlers' Count Two prayer for punitive damages based on the Company's reversion to sucrose-based syrup to supply the needs of those bottlers still resisting amendment.[14] *Id.*

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14. At a pre-trial conference in September of 1988, just over a month after the opinion in *Coke VI*, the district court modified its blanket denial of any fiduciary duty and ruled that a fiduciary duty claim could be pursued on the Company's disclosure of price information as related to the bottlers' market price claim in Count Three of the Coke case. The parties disagree as to whether the district court also retreated on the fiduciary duty issue as it applied to the claim for injunctive relief in Count Two.

On the bottlers' prayer for injunctive relief against a return to sucrose-sweetened syrup, the district court denied summary judgment, rejecting the Company's argument that the bottlers were judicially estopped from making this claim. *Id.* at 80-82. It held that a disputed issue of material fact remained, namely "whether sugar, or more particularly, sucrose, is a defining characteristic of Coca-Cola Bottlers' Syrup under the contracts as of 1988 [the time of this litigation]." *Id.* at 81.

On the bottlers' Count One claim for damages, the district court denied the Company's motion for summary judgment because "a genuine and material issue of fact exists concerning whether the decrees' pricing scheme created an expectancy interest on the bottlers' part that the price of syrup would be linked to sweetener cost, no matter what sweetener was used." *Id.* at 77.

The district court also denied the Company's motion for summary judgment on Count Three, the market price claim, based on the affirmative defense of the applicable statutes of limitations. *Id.* at 87. On Count Four, the antitrust award claim, the district court decided in favor of the Company because the prior settlement did not determine that the sugar producers actually fixed prices and because the Company's recovery was based on the actual cost of its purchases from the sugar producers while the term "market price" in the Consent Decrees, as defined in *Coke III*, did not mean the Company's actual cost of purchase. Thus, the money that the Company recovered was an increase in the price of sugar that it absorbed and not one that it passed on to the bottlers. *See id.* at 89-90.

Finally, in *Coke VI*, the district court held that none of the bottlers who were still active in the litigation had standing to enforce the Consent Decrees because none of them could trace their contractual rights directly to the Whitehead-Lupton Company. It then denied the bottlers' motion to intervene in the "1920 litigation." *Id.* at 90-91, 96.

Coke VI set the stage for the seventh and final district court opinion in the case. Only Counts One through Three remained for decision. By then, a new district court judge had taken over responsibility for the case because the judge who had authored the first six opinions and conducted a trial on the outstanding issues had been prevented from rendering a final decision by illness. *See Coke VII*, 769 F. Supp. at 604.

In *Coke VII*, after a retrial of the outstanding issues, the district court decided in favor of the bottlers on their Count One claim for damages. It held that the bottlers were entitled to syrup sweetened with sugar, that the price of the syrup was tied to the price of the sweetener and that the bottlers who had refused to accept the Company's proposed amendment were entitled "to the savings resulting from the use of the cheaper HFCS in place of sugar." *Id.* at 629-30. The district court also awarded the bottlers prejudgment interest but denied them attorney's fees under Count One. *Id.* at 633-34.

Under Count Two, the court denied the eighteen bottlers who were still operating under the unamended 1921 contracts injunctive relief that would have required the Company to supply them with the now commonly used HFCS-sweetened syrup instead of the sucrose-sweetened syrup. *Id.*

at 648-50. In deciding against the bottlers on Count Two, the court concluded that the Consent Decrees and the contracts entered into under them did not entitle the bottlers to receive anything except a syrup sweetened with 5.32 pounds per gallon of sucrose refined from sugar cane or sugar beets. *Id.* at 653.

On Count Three, the district court applied the definition of market price set forth in *Coke III* and held that "the Company's reliance on list price to calculate the syrup price does not constitute a breach of the pricing provisions of the unamended contracts, and plaintiffs, therefore, are not entitled to damages." *Id.* at 670.

III.

We have appellate jurisdiction over the final judgment of the district court in *Coke VII* under 28 U.S.C.A. § 1291 (West Supp. 1992). The district court had subject-matter jurisdiction pursuant to 28 U.S.C.A. § 1332(a)(1) (West Supp. 1992).

Whether the bottlers' contracts and the Consent Decrees are ambiguous is subject to plenary review. *See Clement v. Consolidated Rail Corp.*, 963 F.2d 599, 600 (3d Cir. 1992); *Washington Hosp. Inc. v. White*, 889 F.2d 1294, 1299-1300 (3d Cir. 1989). The intent of the parties to ambiguous provisions in a contract is, however, a question of fact that an appellate court can set aside only if it is clearly erroneous. *Painewebber, Inc. v. Hartmann*, 921 F.2d 507, 510 (3d Cir. 1990).

IV.

The bottlers raise three issues that cut across all counts: whether they had standing to enforce the Consent Decrees, whether they could intervene

in or reopen the *Coke 1920* litigation that led to the Consent Decrees, and whether the district court erred in granting summary judgment to the Company on the bottlers' fiduciary duty claims. We hold that each of those arguments lacks merit and we reject them without further discussion essentially for the reasons set forth by the district court in its opinions in *Coke IV* and *Coke VI*. *See Coke IV*, 654 F. Supp. at 1429-45; *Coke VI*, 696 F. Supp. at 71-75, 90-96.

We will address the parties' other contentions on a count-by-count basis starting, however, with Count Two.

A.

The district court rejected the bottlers' claim that they had a right to a syrup made with HFCS and denied the continuing bottlers injunctive relief compelling the Company to provide them with syrup made with HFCS.

The district court's conclusion that the bottlers' contracts, as informed by the Consent Decrees, do not require the Company to provide the bottlers with an HFCS-sweetened syrup involves the interpretation of ambiguous terms in the contract, which we review deferentially under the clearly erroneous standard. *See Washington Hosp.*, 889 F.2d at 1299-1300.

The eighteen bottlers who have not agreed to amend their contracts argue that they are entitled to a "standard syrup" under Paragraph Ten of the Consent Decrees and define "standard syrup" as the syrup commonly provided to the Company's bottlers. Because ninety-seven percent of Coca-Cola bottlers now receive HFCS, these eighteen bottlers maintain that HFCS syrup has

replaced syrup sweetened with cane or beet sugar as the "standard syrup." They rely on extracts from the depositions of key Company executives stating that HFCS syrup is a type of syrup covered by the bottlers' contracts. For example, the following deposition testimony of Brian Dyson, President of Coca-Cola U.S.A., was admitted into evidence at trial:

QUESTION: It is true, is it not, that since November of 1984, Coca-Cola bottlers' syrup manufactured by the Coca-Cola Company and supplied to the bottlers in the United States has not contained any sucrose?

ANSWER: I can't remember the exact date, . . . let's take it within the last two or three months, that is absolutely true.

QUESTION: And the Coca-Cola bottlers' syrup being manufactured on April 22 under what the Company has called the old formula contained only HFCS-55 as its sole sweetener?

ANSWER: Yes.

QUESTION: And the Coca-Cola bottlers' syrup manufactured today contains no sucrose?

ANSWER: Yes.

QUESTION: And the Coca-Cola bottlers' syrup today manufactured under the new

formula with the new taste contains only HFCS-55 as its sole sweetener?

ANSWER: Yes.

App. at 2119-20. The bottlers point out that the Company stated in its responses to the bottlers' interrogatories that "Coca-Cola Bottle Syrup containing HFCS-55 meets all requirements of the Bottle Contract for Coca-Cola." *Id.* at 4711. They also argue that the district court's reason for denial of relief on their amended Count Two violates the portions of the Consent Decrees that were found in *Coke III* to be "bottler protective" by guaranteeing them a syrup containing 5.32 pounds of sugar derived from beets or cane at the prevailing market price of such sugar plus a mark-up fixed in terms of dollars and cents. The bottlers argue that their contracts did not merely obligate the Company to provide them with a sugar-based syrup, but rather conveyed to them a property right in the form of a perpetual franchise in the business of bottling and marketing Coca-Cola in all its natural varieties. They contend that the introduction of HFCS syrup requires their contracts to either be interpreted or reformed in a manner that will assure them a supply of HFCS-sweetened syrup because its development was wholly unforeseen in 1921. They rely on Paragraph Ten of the Consent Decrees which

> states that the syrup provided to the parent bottlers by the Company would be "high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty-two one-hundredths (5.32 pounds) of sugar to each

gallon of syrup." Paragraph 10 contains the only description of syrup for bottling purposes in either the Consent Decrees or the bottl[ing] contracts.

Coke VII, 769 F. Supp. at 639 (quoting Consent Decrees).[15] Under the bottlers' asserted interpretation of the Consent Decrees, they are entitled to *all* syrups that may be characterized as standard Coca-Cola bottling syrup. The Consent Decrees, the bottlers maintain, were never designed to limit the scope of their entitlement. To the extent that the Consent Decrees reference a certain composition of the syrup, this only sets a quality baseline below which the syrup may not fall.

In *Coke III* the district court found:

> I conclude the parties to the settlement agreements that became the Consent Decrees intended the term "sugar" in paragraph 10 to mean refined granulated sucrose from cane. The use of sugar from beets violated the Consent Decrees, but the bottlers waived objection to that violation. Thus, the effective present meaning of the term "sugar" in paragraph 10 is refined granulated sucrose from cane or beet, *a definition that excludes HFCS-55.*[16]

Coke III, 654 F. Supp. at 1406 (emphasis added) (footnote added). In *Coke VII*, the district court

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15. It is unclear whether the bottlers continue to press their claims for concentrate instead of syrup. If they do, then we reject those claims for the reasons set forth by the district court. *See Coke VII*, 769 F. Supp. at 646-47, 654.

16. In light of this finding, we see no merit in the argument that the second district judge in *Coke VII* violated the principle of the law of the case in deciding Count Two.

relied on this finding and rejected the bottlers' proposed interpretation, deciding that the bottlers could not compel the Company to provide them with HFCS-sweetened syrup. First, the district court held that "standard" refers to the quality of the syrup, which the bottlers do not contend has been altered, and not to differences in the particular ingredients used in supplying syrup to different bottlers. *Coke VII*, 769 F. Supp. at 640. The district court next concluded that:

> In supplying plaintiffs with sucrose-sweetened syrup, the Company was not only acting within its contractual rights, it was in fact performing an express obligation of plaintiffs' unamended contracts. This is not a situation in which the Company did something that the contracts *permitted*; rather, the Company was obligated by the express terms of the contracts to supply plaintiffs with syrup containing 5.32 pounds of sugar.

Id. at 652 (emphasis in original). The district court's unchallenged findings of fact support this conclusion. For example, after restating the parties' attempts to find substitute sweeteners in the early twentieth century, the district court found that:

> The parties' familiarity with substitute sweeteners in 1921 and their dissatisfaction with the effect of substitute sweeteners on the quality of the syrup, combined with their failure to provide for the use of sweeteners other than sugar in the Consent Decrees and unamended bottle contracts, *is evidence that the parties intended that 5.32 pounds of sugar be used as*

the exclusive sweetener for Bottlers Coca-Cola Syrup.

Id. at 642 (emphasis added).

Without disputing any of the findings of fact that support the district court's conclusions, the bottlers argued that the court's earlier rulings on the distinguishing characteristics of Bottlers' Coca-Cola Syrup are not inconsistent with their claims of right to HFCS syrup. The court responded in *Coke VI* that:

> The Court's previous statements on the question of the meaning of sugar under the contracts and decrees are by no means fatal to the plaintiffs' argument that Coca-Cola Bottlers' Syrup may be, and in light of the Company's utilization of HFCS must be, defined separately from whatever ingredient is used to sweeten it. Albeit supported by this Court's prior statements, the Company's position extends further to the assertion that the sweetener used defines whether a product falls within the scope of the term Coca-Cola Bottlers' Syrup. The Court's previous rulings have not swept this far. Instead, they have centered on the meaning of terms used in the decrees, and have not fully explored the plaintiffs' rights under their contracts . . . .

Coke VI, 696 F. Supp. at 81.

The bottlers' argument is self-defeating. The failure of the pre-*Coke VII* rulings to "swe[ep] th[at] far," *id.*, cannot preclude the district court in *Coke VII* from finally resolving after trial the fact issue of what meaning the parties intended to give the ambiguous phrase "standard syrup" in their individual contracts as informed by the Consent

Decrees. It was precisely this question, the definition of "syrup," that the district court in *Coke VI* reserved for decision because it depended on a genuine dispute about a material issue of fact. *See supra* typescript at 33-34.

The facts found by the district court fully support its dismissal of Count Two in *Coke VII*. None of them are clearly erroneous. Its conclusion flows logically from its findings. A reading of the Consent Decrees amply supports the conclusion that one gallon of Coca-Cola bottling syrup as contemplated by the parties must contain the stipulated ingredients, 5.32 pounds of cane (or beet) sugar. Even if the bottlers' interpretation of the contract was plausible, it is not of sufficient force to render the district court's determination of the contracting parties' intent clearly erroneous. None of the previous rulings of the district court preclude its finding on the meaning of syrup or its conclusion, based on its interpretation of the ambiguous terms "sugar" and "syrup" in the bottlers' contracts and the Consent Decrees, that the bottlers were not entitled to HFCS-sweetened syrup.

Alternately, the bottlers contend that if the contracts and the Consent Decrees are not interpreted to include HFCS-sweetened syrup, they should be reformed because the technological advances that now permit the use of HFCS, as opposed to the corn sugar or corn syrup that was tried and found wanting around the time of World War I, was unforeseen when the Consent Decrees were entered in 1921. The bottlers have not made a case for reformation. Reformation is available when clear and convincing evidence shows the parties had a shared intent to contract on a

subject different from the subject they mistakenly memorialized in recording their agreement, or where their mutual mistake resulted in a written document which does not accurately reflect the terms of the parties' agreement. *See* Restatement (Second) of Contracts § 155 (1981). Contracting parties cannot share an intent about something they entirely failed to foresee.[17] The bottlers have not produced any clear and convincing evidence that the parent bottlers mutually shared with the Company an intention to provide the actual bottlers with the economic benefit of the technological advances that made possible a syrup produced with sweeteners other than sugar, in this case HFCS, comparable in quality to syrup sweetened with cane or beet sugar. Though the bottlers rely heavily on language from *Coke III*, they do not cite the following passage from that opinion:

> Now that a fully acceptable substitute has been developed, and is being used in competing brands, it is in the interest of both the Company and the bottlers to use that substitute in place of sugar. The effect of paragraph 10's sugar requirement is to require the Company to secure the consent of the bottlers before that change is made. It is the task of the parties, not of this

17. The statement by the district court in *Coke VII* that "[a]t most, plaintiffs have shown only that technology may have rendered portions of the unamended contracts obsolete," *Coke VII*, 769 F. Supp. at 650, is consistent with this conclusion. While the availability of satisfactory sweeteners might make a "sugar only" contract an oddity today, sugar as a sweetener is not obsolete. Indeed, the bottlers have remained profitable despite their use of the sugar-based syrup. *See id.* at 605.

> Court, to refashion the agreement to reflect new developments. *See* [*Coke 1921*], 269 Fed. at 805.

Coke III, 654 F. Supp. at 1403. We agree.

As the district court recognized, the bottlers' argument sweeps too far. The Restatement provides:

> Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.

Restatement (Second) of Contracts § 155. We think the statement must be more narrowly read than the bottlers wish. Thus, an example of the kind of mistake for which reformation would be available is a case in which clear evidence shows that the parent bottlers and the Company had wanted 5.23 pounds of sugar per gallon of syrup but the contracts they entered into mistakenly required the syrup to contain 5.32 pounds of sugar per gallon of syrup. *See id.* §§ 155, 166.

There is no proof in the record that the parties made this kind of a mistake in reducing their agreements to writing and incorporating them into the Consent Decrees. The district court's finding that alternative sweeteners had been tried during World War I and were found to be unsatisfactory is not contested. *See Coke VII*, 769 F. Supp. at 641. The contracting parties, instead of leaving room in the Consent Decrees for unforeseen

sweeteners that future research and development might reveal, specified to the one-hundredth of a pound the minimum amount of sucrose that would meet the contract's terms. The fact that the parties failed in 1921 to anticipate and provide for the development of satisfactory sweeteners, other than sucrose, does not mean that they made a mutual mistake in reducing their shared intent to writing when they specified the sweetener for Coca-Cola Bottlers' Syrup would be 5.32 pounds sucrose per gallon. The fact that they based the price of the syrup on the market price of sucrose with a mark-up in absolute terms, instead of a percentage mark-up, is evidence to the contrary.

The natural inference from the specificity of the Consent Decrees is, as the district court found, that the parties intended any change in sweetener to be left to future amendment or new agreement. Had the parties intended the Consent Decrees to cover the "unforeseen" development of other acceptable sweeteners, they should have fashioned a looser definition of "syrup." The bottlers would have us reform their agreement to read 5.32 pounds of sugar per gallon of syrup or the equivalent in sweetening power of any natural sweetener approved by the bottlers despite a lack of any clear evidentiary support that the parties so intended. We decline.

Moreover, the Consent Decrees' definition of the price of syrup in terms of the market price of a precise amount of sucrose refined from cane sugar would have left it up to the district court to decide what price would be "reasonable" for the new HFCS sweetener. The parties must have intended to conclude a contract for the sale of the goods that use HFCS before a court will imply a

reasonable price for them. *See* U.C.C. § 2-305. As the district court has already found, there was no such intent at the time the 1899 agreement or the 1921 Consent Decrees were executed. In any event, even if there were an intent to include HFCS within the scope of the contracts, the evidence the bottlers produced is insufficient for that determination. Although the Uniform Commercial Code has relaxed the common law rule that an agreement to furnish a product which fails to set a price for that product is not a contract that is definite enough to be enforced, that relaxation does not leave a court free to provide a price for the sale of goods the parties have not mentioned in the absence of evidence from which a reasonable price could be inferred. *See id.*; *see also Big Farmer, Inc. v. Agridata Resources, Inc.*, 581 N.E.2d 783, 786 (Ill. App. Ct. 1991); *Pulprint, Inc. v. Louisiana-Pacific Corp.*, 477 N.Y.S.2d 540, 542 (N.Y. 1984).

The bottlers' argument that the price for HFCS syrup, or indeed any syrup using a sweetener other than sucrose, can be mechanically determined by applying a mark-up above the cost of other sweeteners that is proportionate to the 1921 agreement's mark-up above the market price of refined granulated cane or beet sugar is unavailing. The 1921 agreement does not set any percentage mark-up for Coca-Cola syrup. It sets only a fixed amount in absolute monetary terms which is to be added to the market price of cane or beet sugar. There is no evidence to show what other costs or savings are involved in producing or developing Coca-Cola syrup using other sweeteners. The record does not show what research and development costs the Company

incurred in developing HFCS or whether any research and development costs should be included in the price of the newly developed HFCS variety of Coca-Cola bottling syrup. There is likewise nothing in this record that would enable us to determine whether the price of Coca-Cola bottling syrup using HFCS or other new and unforseen sweeteners should be dependent on the market price of those other sweeteners or on the market price of the sugar the parties were familiar with when they made their agreement defining the price of syrup in terms of the price of 5.32 pounds of cane sugar per gallon. We therefore refuse the bottlers' invitation to set a price for syrup sweetened with ingredients other than sucrose. Again, this task is best left to the parties to the agreement, not a court.

We will, therefore, affirm the district court's final judgment in favor of the Company on Count Two.

B.

On Count One, the district court held that the Company had breached the 1921 bottling contracts when it unilaterally substituted the cheaper HFCS-sweetened syrup for sucrose and that the bottlers suffered contractual damages as a result of that breach. It measured those damages by the savings the Company realized when it substituted the cheaper HFCS sweetened syrup for the more costly sucrose-sweetened syrup that Paragraph Ten of the Consent Decrees required it to supply. *See Coke VII*, 769 F. Supp. at 629. The district court assessed the damages in favor of the bottlers by

subtracting the list price of HFCS-55 from the list price of sugar in each relevant quarter and multiplying by the number of gallons of syrup purchased by each plaintiff, adjusting for the actual percentage of HFCS-55 (25%, 50%, 75% or 100%) used in the syrup each quarter.

Id. at 630.[18] The district court also awarded the bottlers prejudgment interest. *Id.* at 633. These awards totalled $20,742,398.20 and are the subject of the Company's cross-appeal.

The parties raise three issues concerning the district court's disposition of Count One. The Company contends that the district court erred in awarding the bottlers anything more than nominal damages even if it did breach the contract by providing HFCS syrup instead of syrup sweetened with cane or beet sugar because that breach did not in any way affect the quality of the syrup or the sales of the bottlers. Hence, the Company argues that the economic benefits the bottlers had a right to expect from their bargains were unaffected and they suffered no damages recoverable in contract beyond nominal damages. Second, the Company argues that even if the award itself could stand, prejudgment interest should not have been given to the twenty-three bottlers who dominate the market for bottled Coca-Cola in the twelve jurisdictions[19] that allow

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18. The various percentages of HFCS used are mentioned because at times the Company used a mixture of HFCS and sugar to make Coke syrup. *See supra* typescript at 22.

19. The twelve jurisdictions are: Arizona, Arkansas, Illinois, Minnesota, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, and Wisconsin. For the

awards of prejudgment interest only for liquidated damages. The bottlers reject these contentions and argue additionally that the district court imposed on them too strict a burden of proof on damages and therefore denied them full compensation for the Company's breach.

In order to show a breach by the Company, the bottlers rely on a "linkage" that the district court found between the quality and price requirements of the bottling contracts. This "linkage," they say, arises from coupling the statement in Paragraph Ten of the Consent Decrees that "high grade standard" syrup contains 5.32 pounds of "sugar" with the provisions in the decrees' Paragraphs Five and Six that every one cent per pound increase in the price of sugar will increase the price of syrup by six cents per gallon.[20]

The bottlers contend that the text of these three paragraphs ties together the syrup's quality and price for the purpose of preventing the Company from escaping its obligation to provide a sugar-based syrup at a sugar-based price and this precludes the Company from substituting a comparable non-sugar-based syrup without changing the price. In support, the bottlers refer to the following portion of the district court's *Coke*

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twenty-three unamended bottlers located in these jurisdictions, *see supra* n.3.

20. This constant ratio of six cents per gallon of syrup for every one cent increase in the price of a pound of sugar exactly mirrors the cost increase attributable to 5.32 pounds of sugar the decrees require the Company to use in each gallon of standard bottlers' syrup, rounded up to the next whole number.

III opinion, which was followed in *Coke VII* in awarding the bottlers damages on Count One:

> The express competitive-pricing rationale recited in paragraph 6 for tying the price of syrup to the price of sugar at a six-to-one ratio is undermined if the Company can use a cheaper sweetener but continue to employ the paragraph 6 pricing mechanism. The requirement of 5.32 pounds of sugar in paragraph 10 ensures the Company cannot evade the pricing provisions of paragraphs 5, 6, and 7, and increase the effective syrup price to the bottlers, by reducing the amount of sugar to less than 5.32 pounds or by using cheaper substitutes.
>
> Defendant argues that so long as the strength of the syrup is maintained, (i.e., the cheaper sweetener is not an inferior sweetener), bottlers are not cheated of their bargain if the Company uses a cheaper sweetener.
>
> The short answer to defendant's argument, and the fact to which the Court must return, is that the 1921 Consent Decrees were premised on the use of granulated cane sugar as a sweetener. In light of the experience of the parties prior to the entry of the Decrees, as well as the strong bargaining position enjoyed by the bottlers after the decision of this Court and argument before the Court of Appeals, the Court finds it unlikely they would enter into an agreement that allowed the Company to exploit a cheaper sugar in the manufacture of Coca-Cola Bottlers Syrup but keep the price of that syrup tied to the price of granulated sugar.

Coke III, 654 F. Supp. at 1401-03.

Essentially the bottlers contend that the effect of the Consent Decrees is to entitle them to syrup dependent on the price to the Company of whatever sweetener it chooses to use. They say that the Company is required to pass-through to the bottlers, as an intended benefit of the bargain, any savings that result from a substitution of sweeteners. Accordingly, the bottlers reject the Company's contention that they suffered no loss of expectancy as a result of the Company's substitution of the cheaper HFCS sweetener for the more expensive sugar-based syrup it promised.

If the bottlers are not entitled to any compensatory damages, there is no need to reach either the issue of the sufficiency of the principal amount of the award or the availability of prejudgment interest. Therefore, we will first consider the bottlers' right to compensatory damages.

Resolution of this issue requires application of some basic principles of the common law of contracts to the facts of this case. Therefore, we exercise plenary review over the district court's conclusion that the bottlers are entitled to compensatory damages measured by the benefit the Company received from using HFCS syrup. On this issue, the Company contends that the district court's award of compensatory damages put the bottlers who refused to amend their contracts in a better position than they would have been had no breach occurred. It says in its brief:

> It is undisputed that syrup sweetened with HFCS is indistinguishable from syrup sweetened with sucrose. The only difference is that it costs

> the Company less to manufacture. At trial the bottlers readily conceded that in terms of sales, operations, expenses, income, and customer satisfaction, they were in exactly the same position during 1980-87 as if the Company had supplied sucrose-sweetened syrup throughout. Their economic position changed not one whit, regardless of whether sucrose or HFCS was used as a sweetener.

Brief for Cross-Appellant at 19-20 (citations omitted). Because it never charged anything more than the price of the sugar-based sweetener, the Company contends that the bottlers have not suffered any loss of expectancy that would entitle them to damages in contract. Thus, the Company continues, recovery here can only be justified on a theory of restitution or unjust enrichment, but the bottlers, in the course of the proceedings in the district court, withdrew and abandoned the restitution claim they had made in their original complaint. *Coke V*, 668 F. Supp. at 922; *see also supra* typescript at 25. Therefore, the Company says that no unjust enrichment award is possible under Count One because the bottlers' only remaining theory of recovery is contract.

In awarding damages to the bottlers, the district court ultimately found that the "linkage" between the agreement's quality and price provisions did make the price of standard bottling syrup dependent upon the type of sweetener used. It based its conclusion that the bottlers are entitled to compensatory damages for breach of contract largely on its sixty-ninth factual finding. That finding states:

> Because both the base price and the escalator provisions were premised on the market price of the amount of sweetener then in use, the Court finds it highly unlikely that the parties could have intended the application of a sugar-based pricing formula to a syrup that did not contain sugar. The Court now turns to the question of which party was intended to benefit from a decrease in the price of the sweetener. . . .

Coke VII, 769 F.2d at 625-26.

To the extent that Finding No. 69 implies the parties did not intend to use a sugar-based pricing formula for a syrup that does not contain sugar, it is correct. The contract is silent on the use of cheaper substitutes like HFCS in place of sugar.[21] It simply makes no provision regarding either their use or the effect of their use on the price of syrup. Implicit in Finding No. 69 is a finding that the court had not been persuaded that the Company and the parent bottlers, when they entered into the 1921 Consent Decrees, contemplated use of any syrup other than one sweetened with cane or beet sugar. As the district court found in *Coke III*, "the 1921 Consent Decrees were premised on the use of granulated cane sugar as a sweetener." *Coke III*, 654 F. Supp. at 1402.

To the extent, however, that Finding No. 69 implies that the Consent Decrees permit the Company to use a syrup sweetened with anything

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21. As discussed *supra*, both the Company and the bottlers in 1921 were well aware of other sweeteners. The specific definition of the sucrose content, as well as the absence of provisions for other substitutes, lead to the conclusion that the Consent Decrees covered nothing but syrup sweetened with 5.32 pounds of sugar.

other than sugar, it cannot stand because it conflicts with the earlier finding in *Coke III* that "the effective present meaning of the term 'sugar' in paragraph 10 is refined granulated sucrose from cane or beet, a definition that excludes HFCS-55." *Id.* at 1406; *see also Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 168-69 (3d Cir. 1982) (judges of co-ordinate jurisdiction may not reverse ruling by different judge in same case except in extraordinary circumstances).

The definition of sugar was not an open question when the district court issued its opinion in *Coke VII*. What the parties to the Consent Decrees intended the term "sugar" to mean was decided in *Coke III* when the district court found that "sugar" meant "sucrose." The only fact that remained in dispute after *Coke IV* was whether the phrase "standard Coca-Cola bottling syrup" included syrups using "sweeteners" other than sucrose. That question was resolved in *Coke VII* when the district court decided "standard bottling syrup" was limited to syrup sweetened with sucrose. The requirement in Paragraph Ten that 5.32 pounds of sugar be used in each gallon of syrup assures the bottlers that they are receiving "high grade standard" syrup. Under the terms of the contract, the Company cannot reduce the amount of sucrose per gallon of syrup below the specified 5.32 pounds. To do so would constitute a breach of contract because the bottlers would not receive a syrup containing 5.32 pounds of sugar, to which they are unquestionably entitled. Accordingly, by unilaterally substituting HFCS for a cane or beet-based sweetener, the Company breached its agreements with the bottlers.

In order to recover anything beyond nominal damages for the Company's breach, the bottlers must show, however, that they suffered a loss of the economic expectancy or benefit they hoped to obtain from their bargains with the Company because of the Company's breach. This requirement is somewhat loosely stated in the general proposition that a breach of contract without pecuniary harm entitles the non-breaching party to no more than nominal damages. *See* Restatement (Second) of Contracts § 346(2) (1981) ("If the breach caused no loss . . . a small sum fixed without regard to the amount of loss will be awarded as nominal damages.").[22] It is an "assumption of contract law that the principal purpose of the rules relating to breach is to place the injured party in as good a position as he would have been had the contract been performed." *Id.* Chapter 16 (§§ 344-385) introductory reporter's note. Under this principle, damages in contract are generally measured by the loss of economic expectancy the non-breaching party suffers as a result of the failure of performance plus any so-called incidental or consequential losses, minus any expenses saved. *Id.* § 347. In unusual cases where it is plain that the non-breaching party has suffered some loss of benefit or expectancy but the

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22. The parties, in large part, have not briefed the issues in this case by citing to contract cases in the various states whose laws might be applicable. We take this as an implied concession that the law in the relevant states is similar and accords with general principles of contract law, hence our reliance on the Restatement and consistent cases instead of an independent investigation of the law of each of the seventeen states, *see supra* n.3, that might apply to this appeal.

monetary value of that loss of expectancy is not susceptible to measurement, courts sometimes resort to a restitution measure of damages; but damages measured by the monetary value of the benefit unjustly reaped by the breaching party are permitted on a contract theory only if a loss of expectancy has been established that is otherwise unquantifiable in pecuniary terms. *See id.* Here, it is uncontested that the HFCS-sweetened syrup is of the same quality as the promised sucrose-based syrup. It is equally acceptable to the consumers of Coca-Cola to whom the bottlers sell, and the bottlers have suffered no loss of sales as a result.[23] The bottlers lost no expectancy by virtue of the substitution. Absent such a loss, no damages are recoverable in contract. The district court's award measured by the benefit to the breaching party is based in restitution and cannot stand in the face of the bottlers' abandonment of that theory. Since the bottlers have suffered no loss of expectancy or bargained for economic benefit, only nominal damages can be awarded on the contract.

The district court's Finding No. 67 in *Coke VII* strengthens our conclusion that the use of HFCS-based syrup and its price are beyond the scope of the Consent Decrees and the contracts the bottlers made with the Company based on those decrees. In Finding No. 67, the district court stated:

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23. The bottlers do not argue, nor have they presented evidence to indicate, any inferiority of the HFCS-sweetened product. In fact, the bottlers' attempt in Count Two to compel the supply of HFCS syrup is strong evidence of its suitability as a sweetener for Coca-Cola.

> Paragraph 10 of the Consent Decrees is both a quality-control and a price-protecting provision. The requirement of "high grade standard Bottlers Coca-Cola Syrup" and the requirement of at least 5.32 pounds of sugar per gallon address the quality of the syrup. The requirement that the syrup contain not less than 5.32 pounds of sugar per gallon addresses price as well as quality by ensuring the Company cannot reduce the amount of sugar in the syrup or use a cheaper sweetener to evade the pricing provisions of paragraphs 5, 6 and 7 of the Consent Decrees.

Coke VII, 769 F. Supp. at 625. The price of the syrup is dependent on the type of sweetener used in the syrup, but, as the district court found, the Consent Decrees specify only one type of sweetener—sucrose. The price provision in the Consent Decrees and the bottlers' contracts is linked entirely to the amount of sucrose used, not to any other type of sweetener. Were we to conclude that the contract includes any substitute sweetener, the syrup containing such substitute would be without a price because the parties never agreed on one. As we explained in our analysis of the issues raised by the district court's denial of the bottlers' Count Two claim of entitlement to HFCS syrup, a court cannot supply a price if the parties have not agreed on one or at least presented evidence from which the court could infer a reasonable price. *See supra* typescript at 43-48. Under the terms of the contracts which obligate the Company to provide Coca-Cola syrup to the bottlers, they are entitled only to sucrose-based syrup and only with respect to

sucrose-based syrup have their minds met as to price. The entire history of this dispute and the precision with which the Consent Decrees defined the quality and the price of the syrup product that was the subject of the bargain on which the bottlers' rights are based negates any intent to permit a court to set a reasonable price. U.C.C. § 2-318 is only a presumptive rule that allows a court to set a reasonable price where it can determine the commodity to be priced was a commodity the parties agreed to buy and sell. The text of the Consent Decrees negates the use of the Uniform Commercial Code presumption.

Our conclusion is not inconsistent with the district court's determination that Paragraph Ten is a "quality control" provision. While we agree that the unilateral actions of the Company breached the quality control aspect of its bargain, it is incumbent upon the bottlers to demonstrate loss resulting from the change in sweeteners. Under an expectancy theory, compensation follows a loss of expected benefit. The Consent Decrees entitled the bottlers to a syrup that, *inter alia*, smelled, tasted, looked and sold like syrup sweetened with 5.32 pounds of sugar. The HFCS syrup met these qualifications. Absent a decrease in quality, the bottlers have suffered no loss of expectancy. Accordingly, the judgment of the district court on Count One must be modified to eliminate its award of expectancy damages to the bottlers and to substitute therefor nominal damages of $1.00.[24]

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24. This modification of the district court's award to the bottlers on Count One makes it unnecessary to reach the Company's contention that the district court erred in awarding prejudgment interest to bottlers from certain states. It is

C.

In Count Three, the bottlers claim that the Company consistently overcharged them for the sugar used in Coca-Cola Bottlers' Syrup. In *Coke VII*, the district court held for the Company on Count Three because the bottlers did not prove that the market price of sugar was other than the list price used by the Company. The district court concluded that "the Company's reliance on list prices to calculate the syrup price does not constitute a breach of the pricing provisions of the unamended contracts, and plaintiffs, therefore, are not entitled to damages." *Coke VII*, 769 F. Supp. at 670. The bottlers again refer to the doctrine of "the law of the case" to attack this holding. They argue that the district court disregarded the earlier conclusion in *Coke III* that market price is the price to the Company, not the published list price. We review this issue for abuse of discretion. *See Schultz v. Onan Corp.*, 737 F.2d 339, 345 (3d Cir. 1984).[25] To the extent that the bottlers attack the

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likewise unnecessary to discuss whether the district court held the bottlers to an excessively strict burden of proof as to damages on Count One.

25. The bottlers contend that our standard of review is plenary. For this proposition they cite to two cases: *International Union, UAW v. Mack Trucks, Inc.*, 917 F.2d 107 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1313 (1991) and *Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir. 1986). Reply Brief of Appellants/Cross-Appellees in Nos. 91-3496 & 91-3498 at 39. Neither of these cases supports their position. *Mack Trucks* dealt with the procedure a district court is bound to follow when it is deciding a case that has been remanded from the court of appeals. *Mack Trucks*, 917 F.2d at 110-11. This question appears similar to, but is definitely distinct from, the question of what a second district court judge may do in the

district court's factual findings, however, we reverse only if its findings were clearly erroneous. *See* Fed. R. Civ. P. 52(a).

The bottlers contend that "Judge Farnan undermined the meaning of Judge Schwartz's ultimate conclusion that 'market price' is the price at which sugar 'is principally *sold* to industrial users.'" Brief for Appellants/Cross-Appellees in No. 91-3496 at 24 (citing *Coke III*, 654 F. Supp. at 1418) (emphasis added). They argue the district court's "equation of market price with the published list price was a dramatic *reversal* of the *Coke III* ruling." *Id.* (emphasis in original) (citations omitted). More specifically, the bottlers argue that the district court in *Coke VII* rejected a mass of testimonial and documentary evidence that Judge Schwartz had accepted, and that Judge Farnan, in *Coke VII*, completely disregarded the earlier finding in *Coke III* on the meaning of "market price." In *Coke III*, the district court found that the Hodgson Memorandum "set[] forth the policy of The Coca-Cola Company with respect to market

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wake of a first district judge's rulings. In the *Mack Trucks* situation, the district court is bound by the decision of the court of appeals absent intervening Supreme Court precedent or an intervening in banc decision of the court of appeals. In our case, any law of the case question pertains to whether or not reargument on an issue may be heard in the district court, not whether the district court improperly ignored binding precedent of an appellate court. *See Schultz*, 737 F.2d at 345. Indeed, the Supreme Court has said the doctrine is one of discretion. *See Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power."). *Dent* merely states our traditional standard of review for issues of law and has absolutely nothing to do with the law of the case. *Dent*, 786 F.2d at 175.

price." *Coke III*, 654 F. Supp. at 1418. The Hodgson Memorandum stated in pertinent part:

> [A]t times a refinery will sell below its own list price and that quoted by Willett & Gray [a recognized standard statistical service on sugar]. Under such circumstances the Purchasing Department has been using the lower price. . . . [W]here there was a possibility of two interpretations . . . the Thomas Company and the Bottler had in every instance benefited.

Id. at 1416 (quoting Hodgson Memorandum). In Finding No. 82 in *Coke VII*, the second district judge wrote:

> The Court finds that the Hodgson Memorandum does not support plaintiffs' assertion that the Company prior to 1969 conducted its own independent investigation into the price of sugar for the first seven days of each quarter.

Coke VII, 769 F. Supp. at 668. The bottlers argue these findings demonstrate that the district court's treatment of the Hodgson Memorandum in *Coke III* is inconsistent with its conclusion in *Coke VII* that the Company's reliance on list prices was not a breach of the provisions in the bottlers' contracts that made the price of syrup dependent on the market price at which the Company was able to buy sugar.

The Company's response is that the district court's definition of market price in *Coke III* merely set the framework for the bottlers' proof. In other words, though *Coke III* defined the term "market price" it left it up to the bottlers to produce evidence sufficient to persuade the court that the Company had not used the "market price" of sugar

to price the syrup it supplied the bottlers. According to the Company, the bottlers still had the burden of proving by a preponderance of the evidence that the figures the Company used did not fit the *Coke III* definition of market price. The Company maintains that the list prices roughly fit the definition of "market price" and that the burden of proving that a lower "actual sales price" existed fell on the bottlers. According to the Company, the district court merely decided that the bottlers had not produced enough evidence to persuade it that the market price of sugar was anything other than the list price.

As discussed *supra*, the first district judge defined the term "market price" in *Coke III* as follows:

> "Market price" as used in paragraph 7 of the Consent Decrees means an average of the price per pound for refined granulated sugar of the grade and in the packaging unit in which it is principally sold to industrial users f.o.b. the refinery, as made known to such industrial users upon inquiry prior to sale by the ten refineries in the United States with the largest capacity and output during the first seven days of each calendar quarter, less any discounts, allowances, or rebates from that price which are available to industrial users or are made known to them upon inquiry prior to sale . . . .

Coke III, 654 F. Supp. at 1418; *see supra* typescript at 30-31. Judge Farnan reviewed this definition and commented that "Judge Schwartz's definition of market price states that 'market price' is a price made available upon inquiry prior to sale — *not* an actual sales price." *Coke VII*, 769 F. Supp. at 659.

Although this was not always the price given upon inquiry, many refiners said that in response to an inquiry seeking their "market price" as defined by Judge Schwartz, they would give their list price. *Id.* at 657. The list price also met the two criteria that Judge Schwartz said were at the crux of the definition: that the syrup price be competitive and verifiable. *Id.* at 658; *Coke III*, 654 F. Supp. at 1407. While Judge Schwartz did stress the evidence showed that the Company sometimes was quoted prices below list price, the definition of market price set out in *Coke III* put the burden on the bottlers to show that "there exists a verifiable price or range of prices, other than list price, which are available upon inquiry prior to sale." *Coke VII*, 769 F. Supp. at 659.

The opinion of the court in *Coke VII* demonstrates that Judge Farnan did not discard Judge Schwartz's definition but merely weighed the evidence the parties presented and concluded that the bottlers

> have not proven by a preponderance of the evidence that there exists a verifiable price or range of prices, other than list price, which are available upon inquiry prior to sale. Phrased differently, [the unamended bottlers] have been unable to prove by a preponderance of the evidence any method for determining the "effective selling price" for the first seven days of any given quarter other than by averaging retrospectively the prices at which sales occurred during that period. An average sales price calculated after the fact is simply not the same thing as a price made available upon inquiry prior to sale.

Id. (footnote omitted).

The bottlers do not claim on appeal that the average sales price information was inadequate. Instead they argue that Judge Farnan reweighed the evidence and made findings of fact contrary to earlier findings made by Judge Schwartz. Considering the different inquiries the two district judges undertook, the painstaking review of the evidence in which the second district judge engaged, and his recognition of the *Coke III* definition of market price, we cannot hold that Judge Farnan erred in *Coke VII* when he decided that the Company's use of the refiners' list prices to determine the market price of sugar did not violate the parties' agreement.

We hold the district court did not violate the doctrine of the law of the case when it decided against the bottlers on Count Three. Accordingly, we will affirm the judgment that the Company did not violate the contracts and the Consent Decrees by using the list price of sugar to determine the price of its sugar-sweetened syrup.[26]

V.

In conclusion, we will affirm the judgment of the district court on Counts Two, Three and Four. We will affirm the judgment of the district court on Count One insofar as it concluded that the Company breached the contracts made in accord with the Consent Decrees, but reverse the award

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26. Finally, we have also considered the bottlers' argument that they were entitled to a portion of the settlement the Company received from the antitrust law suit. We reject it as lacking in merit essentially for the reasons given by the district court in *Coke VI*, 696 F. Supp. at 87-90.

of damages and remand the case for further proceedings consistent with this opinion.

APPENDIX

THIS AGREEMENT, made and entered into on this the 6th day of July, A.D. 1921, by and between COCA-COLA BOTTLING COMPANY, a corporation under the laws of the State of Tennessee, party of the first part, and THE COCA-COLA COMPANY, a corporation under the laws of the State of Delaware, party of the second part:

WITNESSETH:

1: It being recognized that the primary obligation of all parties hereto, as well as all other individuals and Bottling Companies who employ the name Coca-Cola, in their corporate or trade name, is to promote the sale of Coca-Cola, and in consideration of the benefits to be derived by the parties to this instrument from the settlement of all matters of controversy between them in the above stated case, said case is hereby compromised and settled and this agreement is to be presented to the Circuit Court of Appeals and be made the judgment and decree of the proper Court.

2: The present contract between the said parties described in the pleadings in the above entitled cause, as hereby expressly modified and changed, shall remain of full force and effect, and is hereby agreed to be perpetual, and the same shall apply to the parties hereto and their respective successors and assigns; but no

assignment shall be made by the party of the first part without the consent of the party of the second part, as provided in the original contract.

3: The said contract as hereby modified shall operate perpetually, but if abnormal or burdensome conditions or occurrence prevail and the said parties fail to agree on a modification of prices and terms to meet such abnormal or burdensome conditions or occurrence and to continue during the same, then either party shall have the right to demand arbitration as to the price and terms; and if they disagree as to whether or not abnormal or burdensome conditions or occurrence exist, then that question shall also be arbitrated.

. . . .

5: The parties hereto raise the contract price of Coca-Cola Bottlers Syrup as fixed by said existing contract to one dollar and seventeen and a half cents ($1.17) [sic] per gallon delivered as heretofore, including five cents (5¢) per gallon for advertising matter to be delivered at actual cost and freight expenses, and said party of the first part is hereby relieved and discharged from any and all obligations to spend anything for advertising; but it shall be bound to sell and deliver, at such actual cost, the same amount of advertising matter delivered to it by the party of the second part, to the actual Bottlers, as herein provided for. The party of the first part furthermore agrees to pay an additional six cents (6¢) per gallon for such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per

pound, and on the same basis for a fractional advance; same to include all possible increases in the cost of producing such syrup by the party of the second part other than may arise under, and as provided for by the arbitration clauses herein.

6: In order to promote the sale of Coca-Cola and enable the actual bottlers to compete with other beverages, the party of the first part hereby agrees to sell such syrup to the bottlers purchasing from it a not exceeding one dollar and thirty cents ($1.30) per gallon, including five cents (5¢) per gallon for advertising matter to be delivered, and an additional six cents (6¢) per gallon for such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per pound, and on the same basis for a fractional advance; the party of the first part hereby further agrees that any increase in price or change in terms growing out of any agreement or arbitration as provided under paragraph three hereof shall not be exceeded or increased by it in any sales it may make of said syrup to the bottlers purchasing the same from it.

7: It is agreed between the parties that the price of sugar is to be determined quarterly, January, April, July and October in each year, by averaging the market price of standard granulated sugar during the first week in such quarter, as quoted at the refineries by the ten refineries operating in the United States of America at the time, having the largest capacity and output.

. . . .

10: The party of the second part contracts that the syrup sold and furnished by it to the party of the first part is to be high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty two one-hundredths (5.32) pounds of sugar to each gallon of syrup.

. . . .

Coke VI, 696 F. Supp. at 65-66 n.8. The Whitehead-Lupton decree contains two paragraphs not found in the Thomas decree that are immaterial to the resolution of this case. Except for these paragraphs, the decrees are identical. *Id.*

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Coke VII

Reported at 769 F. Supp. 599

COCA-COLA BOTTLING COMPANY OF ELIZABETHTOWN, INC., et al., Plaintiffs,

v.

The COCA-COLA COMPANY, a Delaware Corporation, Defendant.

Civ. A. Nos. 81-48, 87-398-JJF.

United States District Court,

D. Delaware. June 28, 1991.

OPINION

FARNAN, District Judge.

INTRODUCTION

This is one of three related actions involving the contracts which govern the relationship between The Coca-Cola Company (the "Company") and certain of its bottlers (the "bottlers"). This action, which for convenience will be referred to as the *"Elizabethtown "* case, arises out of contractual disputes between the Company and the bottlers involving the supply of syrup for the product bottled Coca-Cola. Two related actions, *Coca-Cola Bottling Co. of Shreveport, Inc. v. The Coca-Cola Co.*, C.A. No. 83-95, and *Alexandria Coca-Cola Bottling Co., Ltd. v. The Coca-Cola Co.*, C.A. No. 83-120 (collectively referred to as the *"diet Coke* cases"), 769 F.Supp. 671, arise from disputes involving introduction by the Company of its new diet product, diet Coke, in 1983. [1]

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[1] For ease of reference, citations to the previous published opinions in the *Elizabethtown* case will be as follows:

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 95 F.R.D. 168 (D.Del.1982) (*"Coke I* at ____").

Footnote continued on next page

Litigation of these cases was conducted for eight years before Hon. Murray M. Schwartz, who became unable to see the litigation to its completion when he became ill in the Winter of 1989, after the end of trial on these matters. The cases were reassigned to me in the Spring of 1989. The parties elected to retry the cases rather than to allow decision on the then-existing record, and the *Elizabethtown* case was retried before me from September 1989-March 1990. This Opinion constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Fed.R.Civ.P. 52(a) in the *Elizabethtown* case.

The *Elizabethtown* litigation began in 1981 and stems from the Company's decision to substitute high-fructose corn

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Footnote continued from previous page

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 98 F.R.D. 254 (D.Del.1983) (*"Coke II* at ____").

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 654 F.Supp. 1388 (D.Del.1986) (*"Coke III* at ____").

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 654 F.Supp. 1419 (D.Del.1987) (*"Coke IV* at ____").

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 668 F.Supp. 906 (D.Del.1987) (*"Coke V* at ____").

Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 696 F.Supp. 57 (D.Del.1988) (*"Coke VI* at ").

Judge Schwartz' six published opinions in the *diet Coke* litigation will hereinafter be cited as follows:

Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co., 563 F.Supp. 1122 (D.Del.1983) (*"diet Coke I* at ____").

Alexandria Coca-Cola Bottling Co. v. Coca-Cola Co., 637 F.Supp. 1220 (D.Del.1984) (*"diet Coke II* at ____").

Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co., 107 F.R.D. 288 (D.Del.1985) (*"diet Coke III* at ____").

Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co., 110 F.R.D. 363 (D.Del.1986) (*"diet Coke IV* at ").

Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co., 696 F.Supp. 97 (D.Del.1988) (*"diet Coke V* at ").

Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co., 123 F.R.D. 97 (D.Del.1988) (*"diet Coke VI* at ").

syrup ("HFCS" or "HFCS-55") for granulated sugar in the syrup for the Coca-Cola beverage drink sold by the Company to the plaintiff bottlers. The dispute centers primarily around the appropriate price of that syrup and evaluation of the Company's conduct in supplying the syrup and negotiating several issues with the bottlers. The *Elizabethtown* litigation also involves alleged historical overcharges by the Company to the bottlers in the sucrose component of the syrup.

Plaintiffs are profitable businesses which are presently or were formerly engaged in the bottling of Coca-Cola under contracts which conform to Consent Decrees issued by this Court in 1921. This action involves 30 plaintiffs and 30 bottling contracts. During the course of the litigation, twelve plaintiffs either amended their bottling contracts or sold their rights to bottle Coca-Cola to bottlers who operate under amended bottling contracts. These twelve plaintiffs seek only past damages and make no claims under Count II, which seeks declaratory and injunctive relief. For convenience these twelve will be referred to as the "past damages plaintiffs." The remaining plaintiffs will be known as full plaintiffs. The full plaintiffs, their principal places of business, and the dates for the beginning of their alleged damage periods are as follows:

PLAINTIFF	STATE OF INCORPORATION OR PRINCIPAL PLACE OF BUSINESS	BEGINNING OF DAMAGE PERIOD
Coca-Cola Bottling Co. of Magnolia	Magnolia, AK	February 2, 1976
Sacramento Coca-Cola Bottling Co.	Sacramento, CA	February 2, 1977
Coca-Cola Bottling Co. of Elizabethtown	Elizabethtown, KY	January 1, 1969
Coca-Cola Bottling Co. of Shelbyville	Shelbyville, KY	January 1, 1969

PLAINTIFF	STATE OF INCORPORATION OR PRINCIPAL PLACE OF BUSINESS	BEGINNING OF DAMAGE PERIOD
Trenton Coca-Cola Bottling Co.	Trenton, MO	February 4, 1976
Kelford Coca-Cola Bottling Co.	Kelford, NC	February 4, 1971
Plymouth Coca-Cola Bottling Co.	Plymouth, NC	February 4, 1971
Wilmington Coca-Cola Bottling Works	Wilmington, NC	February 4, 1971
Coca-Cola Bottling Co. of Dickinson	Dickinson, ND	February 4, 1975
Coca-Cola Bottling Co. of Jamestown	Jamestown, ND	February 4, 1975
Coca-Cola Bottling Co. of Williston	Williston, ND	February 4, 1975
Cleveland Coca-Cola Bottling Co.	Cleveland, OH	January 1, 1969
Coca-Cola Bottling Co. of LeHigh Valley	Bethlehem, PA	January 1, 1969
Laredo Coca-Cola Bottling Co.	Laredo, TX	February 4, 1977
Central Coca-Cola Bottling Co.	Richmond, VA	February 4, 1971
Love Bottling Co.	Muskogee, OK	July 24, 1982
Coca-Cola Bottling Co. of LaCrosse	LaCrosse, WI	July 24, 1981
Arkansas-Georgia	Nashville, AK	July 24, 1982

Consolidated Pretrial order 2-3 (Dkt. 848)

The past damages plaintiffs, their principal places of businesses, and their alleged damages periods are as follows:

PLAINTIFF	STATE OF INCORPORATION OR PRINCIPAL PLACE OF BUSINESS	DAMAGES PERIOD
Coca-Cola Bottling Co. of Streator	Streator, IL	Feb. 2, 1971–April 30, 1987
Natchez Coca-Cola Bottling Co.	Natchez, MS	Feb. 4, 1975–Dec. 31, 1986
Coca-Cola Bottling Co. of Jefferson City	Jefferson City, MO	Feb. 4, 1976–April 30, 1987
Coca-Cola Bottling Co. of Macon	Macon, MO	Feb. 4, 1976–April 30, 1987
Coca-Cola Bottling Co. of Deming	Deming, NM	Feb. 4, 1976–April 30, 1987
Coca-Cola Bottling Co. of Tulsa	Tulsa, OK	Feb. 4, 1976–Dec. 31, 1984
Coca-Cola Bottling Co. of Brownsville	Brownsville, TX	Feb. 4, 1977–May 31, 1984
Coca-Cola Bottling Co. of San Angelo	San Angelo, TX	Feb. 4, 1977–Dec. 30, 1985
Las Cruces Coca-Cola Bottling Co.	Las Cruces, NM	Feb. 4, 1975–Dec. 30, 1985
Coca-Cola Bottling Co. of Tucson	Tucson, AZ	Feb. 4, 1975–Dec. 30, 1985
Coca-Cola Bottling Co. (Alexandria)	St. Cloud, MN	Feb. 4, 1975–July 31, 1984
Coca-Cola Bottling Co. of Marshall	Marshall, TX	Feb. 4, 1975–Oct. 1, 1987

Consolidated Pretrial Order at 3-4 (Dkt. 848).

The Company is a corporation organized and existing under the laws of the State of Delaware, and having its principal office and place of business in the State of Georgia.

Each of the plaintiffs is a corporation that is incorporated in and has its principal place of business in a state other than Delaware or Georgia. Therefore, there is complete diversity of citizenship. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs, and therefore, the Court has subject matter jurisdiction pursuant to 28 U.S.C.A. § 1332(a)(1).

The factual background of this case has been recited repeatedly in Judge Schwartz' published opinions and should be familiar to all who have participated; however, for the sake of completeness in this Opinion, it will be repeated generally.

As indicated, the following narrative is intended to provide background only. Specific occurrences which have bearing on the issues pending before the Court will be discussed in greater detail in the Court's findings of fact under each Count. This narrative is drawn from numerous sources, including evidence presented in the record and Judge Schwartz' prior opinions.

BACKGROUND

In 1886, Dr. John Smyth Pemberton, an Atlanta pharmacist, developed the formula for a syrup that could be mixed with carbonated water to produce a beverage. He named the beverage "Coca-Cola." The name "Coca-Cola" derives from two of the ingredients, coca leaves and cola (or kola) nuts, extracts of which were used to manufacture Merchandise No. 5, one of seven compounds or "merchandises" used by Dr. Pemberton in the original formula for Coca-Cola. *United States v. Coca-Cola Co. of Atlanta*, 241 U.S. 265, 271 & 272, 36 S.Ct. 573, 574 & 575, 60 L.Ed. 995 (1916).

Dr. Pemberton registered the name "Coca-Cola" written in Spencerian script as a trademark "for soda water and other

beverages" on June 6, 1887. The original trademark registration dated June 6, 1887, described Coca-Cola as follows:

> This "Intellectual Beverage" and Temperance Drink contains the valuable Tonic and Nerve Stimulant property of the Coca plant and Cola (or Kola) nuts and makes not only a delicious, exhilarating, refreshing and invigorating Beverage (dispensed from the soda water fountain or in other carbonated beverages), but a valuable Brain Tonic and cure for all nervous affections—Sick Headaches, Neuralgia, Hysteria, Melancholy, ...
>
> The peculiar flavor of COCA-COLA delights every pallet; it is dispensed from the soda fountain in same manner as any other fruit syrups.

PX87.

In 1888, Asa G. Candler, a pharmacist and owner of a wholesale drug company in Atlanta, acquired a partial interest in the Coca-Cola trademark and formula. He acquired complete ownership in 1891. In 1892, Asa Candler formed the Coca-Cola Company, a Georgia corporation (the "Georgia corporation"), to manufacture and market Coca-Cola syrup for use in the soda fountain business, whereby one ounce of the syrup was to be mixed with eight ounces of carbonated water at the point of sale.

The Georgia corporation did not attempt to bottle the syrup for Coca-Cola prior to 1899.[2] In 1899, B.F. Thomas and J.B. Whitehead, two lawyers from Chattanooga, Tennessee, approached Candler about obtaining the right to sell Coca-Cola in "bottles and other receptacles." On July 21, 1899,

[2] However, certain bottlers in isolated instances apparently placed Coca-Cola in bottles prior to 1899.

Candler executed on behalf of the Georgia corporation a contract granting to Whitehead and Thomas the exclusive right to bottle and sell Coca-Cola throughout the United States, with the exception of six New England states, Mississippi and Texas (the "1899 contract"). The 1899 contract also gave Whitehead and Thomas exclusive right to use the trademark "Coca-Cola" on bottles in the territories covered by the contract.

The 1899 contract contemplated that Whitehead and Thomas would form a corporation to be known as the "Coca-Cola Bottling Company" to which their rights under the 1899 contract would be assigned. Whitehead and Thomas formed the Coca-Cola Bottling Company as a Tennessee corporation in December, 1899. It became the first "parent bottler" of Coca-Cola and built plants in Atlanta and Chattanooga.

The 1899 contract required Whitehead and Thomas to meet consumer demand for bottled Coca-Cola, to purchase all syrup for the production of bottled Coca-Cola from the Coca-Cola Company, to refrain from using substitutes for the syrup, to refrain from using the syrup in any way other than that specified, and to sell unbottled syrup only with the written consent of the Company. At the same time, the Company was obligated to sell Whitehead and Thomas their requirements of Coca-Cola syrup at a fixed price as shown on the wholesale price list of fountain syrup in effect at the time, which was attached as an exhibit to the 1899 contract. By an undated amendment, the Whitehead-Thomas contract was amended to fix the syrup price at $1.00 per gallon, less a 10 cents per gallon rebate to pay for "labels and advertising matter" to be provided by the Company at its actual cost. The syrup was to be bottled under pressure of one atmosphere in proportions of not less than one ounce of syrup to eight ounces of water.

The 1899 contract also contemplated that Whitehead and Thomas would, at their own expense, construct a bottling plant in Atlanta and as many additional bottling plants as were needed to meet demand in the territories. Demand grew rapidly, and the two bottling plants built in Atlanta and Chattanooga were soon unable to meet demand outside their respective cities. Other than the Atlanta and Chattanooga plants, the Coca-Cola Bottling Company did not actually bottle the beverage itself. Rather, beginning in 1900, the Coca-Cola Bottling Company entered into contracts wherein Thomas and Whitehead assigned certain of their rights under the 1899 Contract to individuals, partnerships, and corporations (referred to hereinafter as "actual" bottlers), who built bottling plants and promoted and sold bottled Coca-Cola in exclusive territories assigned to them by Coca-Cola Bottling Company.

A dispute arose between Whitehead and Thomas over the desirable contract period with the actual bottlers. While Thomas favored a two-year term, Whitehead favored perpetual contracts. With the Georgia corporation's permission, Whitehead and Thomas divided the rights granted to them under the 1899 contract. Thomas retained ownership of Coca-Cola Bottling Company (referred to hereinafter as the "Thomas Company"). The Thomas Company conveyed to Whitehead and his new business associate, J.T. Lupton, its rights under the 1899 contract for all territories except the District of Columbia and the states of New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, North Carolina, Tennessee, Kentucky, Indiana, Ohio, Washington, Oregon, California, and small portions of Georgia and Alabama. Whitehead and Lupton then formed a Tennessee corporation called Dixie Coca-Cola Bottling Company, the name of which was thereafter changed to *The*

Coca-Cola Bottling Company (referred to hereinafter as "Whitehead-Lupton Company"). The Georgia corporation, Thomas Company, and Whitehead-Lupton Company joined in amending the 1899 agreement to reflect the division. The Thomas Company and the Whitehead-Lupton Company were known as "parent bottlers."

The Whitehead-Lupton Company and the Thomas Company further divided their territories among other parent and "subparent" bottlers. Subparent bottlers of the Whitehead-Lupton Company included Western Coca-Cola Bottling Company and The Coca-Cola Bottling Company (1903). Subparent bottlers of the Thomas Company were Coca-Cola Bottling Works, Coca-Cola Bottling Works the 3d, and Pacific Coca-Cola Bottling. The bottling plants built by Whitehead and Thomas in Atlanta and Chattanooga were sold to the actual bottlers to whom the rights for those territories were assigned. Thereafter the parent bottlers did not own any Coca-Cola bottling plants, nor were they engaged in the actual bottling or sale of Coca-Cola beverage, which was left entirely to the actual bottlers. The actual bottlers were also primarily responsible for developing a market for bottled Coca-Cola in their respective territories, although the Georgia corporation apparently contributed funds to help develop a market.

In 1919, the property, good will, and business of the Georgia corporation founded by Candler was acquired by a Delaware corporation also called "The Coca-Cola Company," which assumed the Georgia corporation's outstanding contracts and liabilities. Thereafter, the Georgia corporation surrendered its charter.[3]

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[3] For ease of reference the Georgia corporation and the successor Delaware corporation will hereinafter be referred to interchangeably as "the Company."

Between 1899 and 1920 there were several changes in the formula for Coca-Cola syrup. Most notable of these was the elimination of saccharin as a sweetening ingredient in the syrup produced after 1907. Prior to 1906, the syrup was sweetened with a combination of sugar and saccharin. Following the passage of the Pure Food and Drug Act, the Company began using granulated sugar in place of saccharin. Refined granulated sugar became the most expensive ingredient in the manufacture of the syrup. The parties agreed to an increase in the fixed price of the syrup to reflect the higher sweetener cost.

The onset of World War I brought with it sugar rationing and rigid price controls which held the price of sugar at nine cents per pound. At the end of the War, a severe sugar shortage combined with removal of the price controls caused the price of sugar to skyrocket from nine cents per pound in September 1919 to over twenty-seven cents per pound by June 1920. This extreme rise in the price of sugar caused the parent bottlers in late 1919 to agree to a temporary amendment to their contracts allowing the Company to pass sugar price increases in excess of nine cents per pound to the actual bottlers. This was the first time the parties agreed to a fluctuating price based upon the actual cost of an ingredient.

The Company in January 1920 sought relief from the fixed price contract and proposed a fluctuating price tied to the cost of manufacture of the syrup. The parent bottlers advised that they would not enter into negotiations to amend their contracts with the Company until the Company provided itemized information concerning the cost of manufacturing the syrup. Except for providing cost statements prepared by its accountants, the Company refused to disclose the cost information, informing the bottlers they should

rely on "the integrity and good faith of The Coca-Cola Company." The parent bottlers' rejection of the flexible pricing proposal precipitated a confrontation between themselves and the Company concerning the nature of the bottling contracts. The Company took the position that the contracts were terminable at will. The parent bottlers, on the other hand, insisted their contracts were perpetual. The Company informed the parent bottlers that their contracts would be terminated as of May 1, 1920. On April 9, 1920, the Company notified all actual bottlers that its negotiations with the parent bottlers had ceased, that the parent bottlers' contracts would be terminated on May 1, 1920, and that the Company would contract directly with the actual bottlers as soon as circumstances permitted.

On April 13, 1920, the two principal parent bottlers filed suit in Fulton County, Georgia Superior Court to enjoin the Company from terminating their contracts. A temporary restraining order was entered which prohibited the Company from selling Coca-Cola syrup to anyone other than the parent bottlers. The actual bottlers employed J.B. Sizer, a Chattanooga lawyer, to represent their interests in the litigation. Sizer reported to a special committee appointed by the Coca-Cola Bottlers' Association, the trade organization to which the actual bottlers belonged. Sizer's fees were paid by the Association and by assessments of the actual bottlers in the Whitehead-Lupton and Thomas territories based upon the gallonage of syrup used by each bottler. Six actual bottlers intervened in the litigation in support of the parent bottlers. The Georgia suit was voluntarily dismissed by the parent bottlers on May 20, 1920 and refiled on June 1, 1920 in the United States District Court for the District of Delaware.

The parties agreed to the entry of an order on June 10, 1920 (the "June 10 order") requiring the Company to supply

the parent and actual bottlers' requirements of Coca-Cola syrup during the pendency of the litigation. The order set the price of syrup paid by the actual bottlers at $1.72 per gallon until November 1, 1920, by which time final decision in the litigation was expected. The June 10 order further provided that if the court had not rendered final decision by November 1, 1920, the syrup price would be increased or decreased based upon the Company's actual costs of manufacturing the syrup.

In May 1920 the Company purchased a year's supply of refined cane sugar at a cost of about twenty cents per pound. During negotiations leading to the entry of the June 10 order, the Company failed to disclose that it had entered into this long-term sugar contract at a price near the top of the market. Beginning in June 1920, the market price of sugar began to decrease steadily. It fell to eleven cents per pound by November 1920 and continued to decline to five and one-half cents per pound by July 1921. From June to November 1920, however, the bottlers' syrup price remained fixed under the June 10 order. Thus, while the prices of competing soft drinks fell, the retail price of Coca-Cola remained high, causing a sharp decline in sales volume. Although the bottlers expected price relief on November 1, the Company announced a price increase in order to recoup the cost of its inventories of high-priced sugar. The bottlers learned that by agreeing to the June 10 order basing the price of syrup on the Company's actual costs, they had unwittingly exposed themselves to and insulated the Company from the hazards of the marketplace and the Company's apparent poor judgment in making long-term sugar purchases near the top of the market.

On November 8, 1920 the Delaware District Court granted the parent bottlers' motions for a preliminary injunction

preventing the Company from terminating the contracts. The court held that the contracts were perpetual and that the parent bottlers had received from the Company property rights in the business of bottling Coca-Cola beverage. *The Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 269 F. 796 (D.Del.1920) (cited hereinafter as "*Coke 1920* at ____"). The parties resumed settlement negotiations. After the exchange of numerous proposals between the two litigants, as well as from the actual bottlers, settlement negotiations reached an impasse on March 8, 1921.

The Company appealed the District Court's preliminary injunction ruling to the United States Court of Appeals for the Third Circuit. The Company's appeal was argued on May 3, 1921, at which time the presiding judge recommended that the parties consider settlement. New negotiators were appointed. While the appeal was pending, the parties entered into two settlement agreements, one between the Company and the Thomas Company, and the other between the Company and the Whitehead-Lupton Company. The Delaware District Court formally incorporated those agreements as final judgments on October 4, 1921. The decrees incorporating the settlement agreements (the "Consent Decrees") are identical with the exception of two paragraphs in the Whitehead-Lupton agreement not relevant here. The Consent Decrees read in pertinent part as follows:

> It appearing to the Court that the above stated cause is now ripe for final decree; that the parties thereto, including all of the Intervenors actually intervening in said cause, have entered into an agreement settling and compromising said case and all questions of difference thereon arising, an original signed copy of which contract has been exhibited to the Court and a true and correct copy

of which is hereto attached as Exhibit 1, and Counsel representing the several parties to said cause moving the Court to make said agreement of compromise and settlement the decree of the Court in said cause, and all parties in open court consenting thereto,

IT IS ORDERED, ADJUDGED AND DECREED: That said agreement or settlement and compromise, as the same appears attached hereto as Exhibit 1, be and the same is made the decree of this Court; and that it is so accordingly adjudged and decreed by the Court.

The settlement agreement incorporated in the Thomas Company case is reproduced in pertinent part below:

THIS AGREEMENT, made and entered into on this the 6th day of July, A.D. 1921, by and between COCA-COLA BOTTLING COMPANY, a corporation under the laws of the State of Tennessee, party of the first part, and THE COCA-COLA COMPANY, a corporation under the laws of the State of Delaware, party of the second part:

WITNESSETH:

1: It being recognized that the primary obligation of all parties hereto, as well as all other individuals and Bottling Companies who employ the name Coca-Cola, in their corporate or trade name, is to promote the sale of Coca-Cola, and in consideration of the benefits to be derived by the parties to this instrument from the settlement of all matters of controversy between them in the above stated case, said case is hereby compromised and settled and this agreement is to be presented to the Circuit

Court of Appeals and be made the judgment and decree of the proper Court.

2: The present contract between the said parties described in the pleadings in the above entitled cause, as hereby expressly modified and changed, shall remain of full force and effect, and is hereby agreed to be perpetual, and the same shall apply to the parties hereto and their respective successors and assigns; but no assignment shall be made by the party of the first part without the consent of the party of the second part, as provided in the original contract.

3: The said contract, as hereby modified shall operate perpetually, but if abnormal or burdensome conditions or occurrence prevail and the said parties fail to agree on a modification of prices and terms to meet such abnormal or burdensome conditions or occurrence and to continue during the same, then either party shall have the right to demand arbitration as to the price and terms; *and* if they disagree as to whether or not abnormal or burdensome conditions or occurrence exist, then that question shall also be arbitrated.

4: No forfeiture of any kind shall ever take place under the said contract as hereby amended until after the party of the first part shall have ninety (90) days written notice and opportunity to correct the conditions complained of, and if not corrected within said time and grounds of forfeiture exist, such forfeiture shall then occur; and if any forfeiture should ever arise as to any territory by reason of the act of any actual or sub-bottler, said

forfeiture shall only apply to and embrace the territory supplied by the bottling plant of said offending actual or sub-bottler, and shall not extend to, nor cover, territory covered by the territory of any other bottler, even though said territory was obtained from or through the offending bottler.

5: The parties hereto raise the contract price of Coca-Cola Bottlers Syrup as fixed by said existing contract to one dollar and seventeen and one-half cents ($1.17) per gallon delivered as heretofore, including five cents (5¢) per gallon for advertising matter to be delivered at actual cost and freight expenses, and said party of the first part is hereby relieved and discharged from any and all obligations to spend anything for advertising; but it shall be bound to sell and deliver, at such actual cost, the same amount of advertising matter delivered to it by the party of the second part, to the actual Bottlers, as herein provided for. The party of the first part furthermore agrees to pay an additional six cents (6¢) per gallon for such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per pound, and on the same basis for a fractional advance; same to include all possible increases in the cost of producing such syrup by the party of the second part other than may arise under, and as provided for by the arbitration clauses herein.

6: In order to promote the sale of Coca-Cola and enable the actual bottlers to compete with other beverages, the party of the first part hereby agrees to sell such syrup to the bottlers purchasing from it at not exceeding one dollar and thirty

cents ($1.30) per gallon, including five cents (5¢) per gallon for advertising matter to be delivered, and an additional six cents (6¢) per gallon for such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per pound, and on the same basis for a fractional advance; the party of the first part hereby further agrees that any increase in price or change in terms growing out of any agreement or arbitration as provided under paragraph three hereof shall not be exceeded or increased by it in any sales it may make of said syrup to the bottlers purchasing the same from it.

7: It is agreed between the parties that the price of sugar is to be determined quarterly, January, April, July and October in each year, by averaging the market price of standard granulated sugar during the first week in such quarter, as quoted at the refineries by the ten refineries operating in the United States of America at the time, having the largest capacity and output.

. . . .

10: The party of the second part contracts that the syrup sold and furnished by it to the party of the first part is to be *high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty two one-hundredths (5.32) pounds of sugar to each gallon of syrup.*

. . . .

IN WITNESS WHEREOF, the said parties hereto, through their proper officers, and pursuant to reso-

lutions of their respective Boards of Directors authorizing them so to do, have hereunto signed their names and affixed their corporate seals, on the day and date first herein written. In duplicate.

(emphasis added).

The Whitehead-Lupton decree contains the following paragraphs not found in the Thomas decree:

> 15: This settlement is conditioned upon the consent of the actual bottlers to the modification of their contracts with the party of the first part in accordance with the terms of this agreement.
>
> 16: The parties hereto will request the Court of Appeals to postpone a decision until it can be determined whether such actual bottlers will consent. If such consent cannot be secured by September 1st, 1921, the parties to this agreement will agree upon the plan of procedure, and if they fail so to agree, shall submit the matter to arbitration as to what shall be done in regard thereto.

Except for these paragraphs, the two decrees are identical.

The Consent Decrees amended and clarified the contracts between the Company and the parent bottlers. The settlement agreement between the Company and the Whitehead-Lupton Company was contingent upon the agreement of the actual bottlers in the Whitehead-Lupton territory because the bottle contracts between the Whitehead-Lupton Company and its bottlers were perpetual. The contracts between the Thomas Company and its bottlers were two-year contracts, most of which had expired during the pendency of the 1920 litigation. Therefore, the settlement

agreement between the Company and the Thomas Company was not required to be contingent upon the consent of the bottlers in the Thomas territories. In 1921, the actual bottlers' contracts in the Whitehead-Lupton and Thomas territories were amended to conform to the Consent Decrees. At the same time, the Thomas Company entered into perpetual contracts with its bottlers. It is these contracts which are at issue in the *Elizabethtown* litigation presently before the Court.

Between 1921 and 1975 the Company gradually acquired all of the parent and subparent bottlers and assumed their obligations to the actual bottlers. In 1978, the Company proposed amendments to the actual bottlers' contracts ("1978 Amendment") to substitute a new syrup pricing formula using a "sugar element," a "base element," and the Consumer Price Index. The proposed amendments also provided that the savings resulting from any substitution of another sweetener for sugar in the syrup would be passed through to the actual bottlers. From 1978 until 1987, when the Company withdrew the proposed amendment, a great majority of the actual bottlers, constituting 97% of the volume of the Coca-Cola bottling business, signed the 1978 Amendment. The remaining bottlers, who continue to purchase syrup under the original bottle contracts which comply with the 1921 Consent Decrees, are the plaintiffs in this litigation.

In January 1980, the Company started using high-fructose corn syrup in place of granulated sugar made from cane or beets to sweeten Coca-Cola syrup. Originally HFCS constituted fifty percent of the sweetener used in the syrup. Eventually, the Company stopped using sugar altogether and HFCS constituted 100% of the sweetener. From 1980-1987 the Company supplied HFCS-sweetened syrup both to

the "amenders" (that is, those bottlers that signed the 1978 Amendment) and the "unamenders" (those bottlers that continued to operate under the original contracts). The amenders received a "pass-through" of the Company's savings from using the cheaper HFCS sweetener. The Company continued to charge the unamenders the sugar-based price described in the pricing provisions of their unamended contracts. The unamenders brought this suit alleging that the Company's continued use of a sugar-based price overcharged them and seeking a pass-through of the Company's HFCS savings. This contention is the substance of Count I of this action.

In 1986, Judge Schwartz conducted a bench trial on two issues, one of which was the definition of sugar as it is used in the 1921 Consent Decrees upon which plaintiffs' bottle contracts are based. The plaintiffs argued in 1986 that the term "sugar" as used in the Consent Decrees meant refined granulated sugar, i.e., sucrose. They asserted that HFCS-55 was not "sugar" for purposes of their contracts and the Consent Decrees. The Company argued that "sugar" was a generic term for a family of complex carbohydrates, including sucrose, fructose, and glucose. The Company's definition of "sugar" would have included HFCS. Judge Schwartz concluded that " 'sugar' for purposes of paragraph 10 [of the Consent Decrees] means refined granulated sugar from cane or beet, and therefore HFCS-55 is not sugar as that term is used in paragraph 10 of the 1921 Consent Decrees...." *Coke III* at 1391. After Judge Schwartz declined to reconsider his ruling or to certify it for appeal, the Company informed plaintiffs that it would begin to supply them with syrup sweetened only with refined granulated sugar from cane or beet. The Company intended to continue supplying the amended bottlers with HFCS-sweetened syrup. The Company's action

prompted plaintiffs to file a supplemental complaint in this action seeking an injunction to prevent the Company from supplying to them syrup sweetened only with sugar. In the supplemental complaint, plaintiffs also allege that the Company's actions in connection with its decision to provide plaintiffs with syrup sweetened only with granulated sugar from cane or beet breached an alleged covenant of good faith and fair dealing implied in their bottle contracts. Judge Schwartz denied plaintiffs' motion for a preliminary injunction, and the Company has supplied sugar-sweetened syrup to plaintiffs since late in 1987. Plaintiffs' efforts to obtain syrup sweetened with HFCS form the basis of Count II of their complaint.

Count III centers around whether the Company has breached its obligation under the bottle contracts to charge plaintiffs a syrup price based upon the "market price" of sugar. The Consent Decrees set the price of the syrup according to a formula based upon the "market price" of sugar "as quoted at the refineries by the ten refineries operating in the United States ... at the time, having the largest capacity of output." Consent Decrees, ¶ 7. In a bench trial conducted in 1986, Judge Schwartz decided the meaning of the term "market price." Plaintiffs contended that "market price" was an average of actual selling prices, while the Company asserted that the list price, i.e., the price published in trade journals and official price lists, was the market price. Judge Schwartz held that the term "market price" meant:

> an average of the price per pound for refined granulated sugar of the grade and in the packaging unit in which it is principally sold to industrial users f.o.b. the refinery, as made known to such industrial users upon inquiry prior to sale by the ten

> refineries in the United States with the largest capacity and output during the first seven days of each calendar quarter, less any discounts, allowances, or rebates from that price which are available to industrial users or are made known to them upon inquiry prior to sale, but not including a standard two percent cash discount or any individually negotiated discounts, allowances, or rebates.

Coke III at 1391. Count III involves whether the Company's reliance on the list prices published in trade publications and on refiners' price lists as the prices upon which it bases its calculation of "market price" violates the definition set out above.

Thus concludes a narrative of the events leading to this litigation. Before embarking upon more detailed findings of fact and conclusions of law on each of the three Counts, however, it is necessary to set forth the general legal principles which must govern the Court's consideration of the issues.

GENERAL PRINCIPLES OF LAW

A. *Law of the Case*

1. Various issues in this lengthy litigation have been explored by my predecessor, Hon. Murray M. Schwartz, in six published opinions and numerous orders and unpublished opinions.

2. Except for those portions entered into the 1989-1990 trial record, the record of the trial before Judge Schwartz in 1988-1989 is not part of the record of this case.

3. The Court's conclusions of law are limited by the law of the case doctrine, which in this context provides generally

that "judges of coordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other." *TCF Film Corp. v. Gourley*, 240 F.2d 711, 713 (3d Cir.1957); *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking*, 576 F.Supp. 107, 125 (D.Del.1983), *aff'd without opinion*, 740 F.2d 956, 957 & 958 (3d Cir.1984). Therefore, the Court is bound by Judge Schwartz' definitions of sugar and market price as enunciated in *Coke III*. The general rule is a rule of judicial comity intended to preserve the orderly functioning of judicial process. *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 168 (3d Cir.1982); *TCF Film Corp.*, 240 F.2d at 714; *Rose Hall, Ltd.*, 576 F.Supp. at 125-26. The Court recognizes that the general rule is not absolute, however. There are exceptional circumstances under which a successor judge is empowered to reconsider the rulings of his predecessor. Such an "exceptional circumstance" may arise when the original judge is by death, resignation or disability not available to reconsider his decisions. *Hayman Cash Register Co.*, 669 F.2d at 169; *TCF Film Corp.*, 240 F.2d at 714; *Rose Hall, Ltd.*, 576 F.Supp. at 126. The retrial before me of the case at bar upon Judge Schwartz' illness could be considered such an "exceptional circumstance" because some of the issues in this case could not be presented for reconsideration to Judge Schwartz before he became ill. *See United States v. Wheeler*, 256 F.2d 745, 747 (3d Cir.), *cert. denied*, 358 U.S. 873, 79 S.Ct. 111, 3 L.Ed.2d 103 (1958). Therefore, the Court will reconsider a ruling if appropriate as an "exceptional circumstance," i.e., a ruling which was not and could not have been reconsidered by Judge Schwartz.

4. Any legal rulings or opinions stated by Judge Schwartz during the course of denying the motions for summary judgment in *Coke VI* and the various summary judgment motions in the *diet Coke* litigation are understood not to

be binding as the law of the case:

> The denial of a motion for summary judgment is an interlocutory ruling which establishes no more than that on the summary judgment record there are fact issues which should be submitted to the trier of fact. Since the record at a trial may be different, such a preliminary ruling does not determine what issues should be submitted to the jury.

Kutner Buick, Inc. v. American Motors Corp., 868 F.2d 614, 619 (3d Cir.1989). Thus, any opinions offered by Judge Schwartz should be understood as offered for the limited purpose of determining whether summary judgment was appropriate and not for the purpose of finding facts or making legal conclusions on the full record in the context of disposition on the merits. The task of dispositive findings and conclusions is the work of this Opinion.

5. Although not a part of the law of this case, the Court may find Judge Schwartz' rulings in the related *diet Coke* litigation persuasive.

B. *Governing Principles of Law*

6. Delaware applies the principle stated in the *Restatement (Second) Conflicts of Law* § 188 (1971) that the law of the state with the most significant relationship to the transaction governs. *Coke V* at 918.

7. The state with the most significant relationship to the subject of each transaction is the state in which the principal place of business of each plaintiff is located. *See Coke V* at 918.

8. Interpretation of each plaintiff's contract will be governed by the law of the state in which that plaintiff's principal place of business is located.

9. The actual bottlers are not the intended beneficiaries of the Consent Decrees, and none of the bottlers remaining in the litigation have standing to enforce them. *Coke VI* at 90-91. The only rights assigned to the plaintiffs by the parents include (a) use of the trademark, (b) an exclusive license to bottle Coca-Cola, and (c) the right to use the Root bottle. *Id.* at 90-91; *Coke IV* at 1441.

10. Although none of the bottlers remaining in the litigation have standing to enforce the Consent Decrees entered by this Court in 1921 to resolve the 1920 litigation, *Coke VI* at 91, the Consent Decrees bear a close nexus to the plaintiffs' bottle contracts. *Coke V* at 915. The Consent Decrees' delineation of the agreements between the Company and the parent bottlers informs the interpretation of the plaintiffs' bottling contracts. *Id.* at 916. For example, the syrup received by the actual bottlers cannot be different from that which the Company was bound by the Consent Decrees to deliver to the parent bottlers. *Id.*

11. Further, it is clear that the interests of the actual bottlers were considered by the parties to the Consent Decrees. The negotiators for the Company and the parent bottlers considered the ultimate effect of the pricing mechanism on the actual bottlers. *See* PX569 ("[I]n arriving at a settlement we must never forget that there are other parties concerned, besides the Parent Bottling Companies and this Company.... [T]here must be an agreement in advance which determines the price that the Actual Bottlers are to pay for COCA-COLA. This is necessary from the Actual Bottlers' point of view, and from the point of view of the success of the business"); PX576 ("It is for the protection of the actual bottlers that [the parent bottlers] have been so insistent that in arranging a sliding scale the actual cost of Coca-Cola should be correctly and fairly ascertained.").

12. In *United States v. Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971), the United States Supreme Court set forth the "four corners" test for interpreting a consent decree:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.... [T]he instrument must be construed as it is written, and not as it might have been written....

Id. at 681-82, 91 S.Ct. at 1757. Thus, when construing the Consent Decrees, the Court's first resort is to the "four corners" of the Decrees, or in other words, to the language of the Decrees. *See Halderman v. Pennhurst State School and Hosp.*, 901 F.2d 311, 319 (3d Cir.), *cert. denied*, — U.S. ——, 111 S.Ct. 140, 112 L.Ed.2d 107 (1990).

13. The parties argue various circumstances extrinsic to

the four corners of the Consent Decrees in support of their respective interpretations. Since reliance upon aids of construction, such as the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree, does not depart from the "four corners" rule of *United States v. Armour & Co.*, *see United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 n. 10, 95 S.Ct. 926, 934-35 n. 10, 43 L.Ed.2d 148 (1975); *Allen-Myland, Inc. v. International Business Machines Corp*, 746 F.Supp. 520, 542 (E.D.Pa.1990); *Coke III* at 1397, the Court may consider the parties' arguments.

C. *General Principles of Contract Interpretation*

14. When interpreting a contract, the primary function of the Court is to ascertain the intention of the parties. 4 *Williston on Contracts* § 601 at 303-05.

15. The Court should give effect to the mutual intention of the parties at the time the contract is executed. The Court should put itself in the position of the parties, looking forward from the time they entered into the contract. The Court should not view the contract from a position of hindsight. *Generally, 4 Williston on Contracts* § 607. "Judicial construction of a contract requires a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties." *Id.* § 600A at 287 (quoting *Hunt v. Triplex Safety Glass Co. of North America*, 60 F.2d 92, 94 (6th Cir.1932)).

16. The Court should give the greatest weight to the express language of the contract itself, *Restatement (Second) of Contracts* § 203(b) at 93 (*"[E]xpress terms are given greater weight than course of performance, course of dealing, usage of trade...."*) (emphasis added); *see also United States v. Armour &*

Co., 402 U.S. 673, 678, 91 S.Ct. 1752, 1755- 56, 29 L.Ed.2d 256 (1971), as the words themselves are the best and most important evidence of the intention of the parties. 4 *Williston on Contracts* § 610A at 514. The meaning of words is dependent upon their context, and the contract should be interpreted as a whole. 4 *Williston on Contracts* § 618 at 710-11; 2 E.A. Farnsworth, *Farnsworth on Contracts* § 7.13 at 292-93 (1990). An interpretation wherein the whole can be read so as to give significance to each part is preferred. *Restatement (Second) of Contracts* § 202(2) & comment d. Where possible, the meaning of a term should be consistent throughout the contract.

17. When the words of the contract are ambiguous, the Court may look to other indicia of the parties' intent, including the circumstances surrounding the making of the contract and course of performance. These indicia are secondary, however, to the actual contractual language. *Generally, Restatement (Second) of Contracts* §§ 202 & 203(b). A contract term is ambiguous if it is subject to reasonable alternative interpretations. *Taylor v. The Continental Group Change in Control Severance Pay Plan*, 933 F.2d 1227 (3d Cir.1991) (citing *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir.1980)). "In making the ambiguity determination, a court must consider the words of the agreement, alternative meanings suggested by counsel, and extrinsic evidence offered in support of those meanings." *International Union, U.A.W. v. Mack Trucks, Inc.*, 917 F.2d 107, 111 (3d Cir.1990) (quoting *Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 101 (3d Cir.1986)).

18. The Court should not rewrite the contract for the parties. It is not the Court's function to change the obligations of the parties under a contract that they saw fit to

make. 4 *Williston on Contracts* § 610A at 513. In applying the principles of contract interpretation, the Court "must guard against inadvertently reforming a contract 'under the guise of construction' by 'looking too intently for means of bringing about some ultimate good, thwarting an apparent wrong, or preventing hardship....' " *Coke III* at 1397; *Coke 1920* at 805.

19. Courts do not rewrite contracts to include terms not assented to by the parties. *E.g., Levy v. Levy*, 130 Wis.2d 523, 388 N.W.2d 170, 174-75 (1986) ("In the guise of construing a contract, courts cannot insert what has been omitted or rewrite a contract made by the parties"); *E.E.E., Inc. v. Hanson*, 318 N.W.2d 101, 104 (N.D.1982) ("Normally, parties to a contract are allowed to write the terms of the contract themselves. A court may be called upon to interpret a contract written by the parties thereto but the court's authority to interpret a contract does not give a court the authority to modify it") (citation omitted); *Glantz Contracting Co. v. General Electric Co.*, 379 So.2d 912, 916 (Miss.1980) ("Courts do not have the power to make contracts where none exist, nor to modify, add to, or subtract from the terms of one in existence") (quoting *Citizens National Bank of Meridian v. Glascock, Inc.*, 243 So.2d 67, 70 (Miss.1971)); *Stull v. Hicks*, 59 Ill.App.3d 665, 16 Ill.Dec. 874, 876, 375 N.E.2d 981, 983 (1978) ("We are mindful of the fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise of construction").

20. Absent illegality, mistake, fraud, duress or unconscionability, it is not within the Court's power to revise, modify, alter, extend, or remake the parties' contract to include terms not agreed upon by the parties. *Glantz Contracting Co. v. General Elec. Co.*, 379 So.2d 912 (Miss.1980); *St. Joseph Data Service, Inc. v. Thomas Jefferson Life Ins. Co. of America*, 73

Ill.App.3d 935, 30 Ill.Dec. 575, 393 N.E.2d 611 (1979); *Stull v. Hicks*, 59 Ill.App.3d 665, 16 Ill.Dec. 874, 375 N.E.2d 981 (1978); *Low v. Davidson Manufacturing Co.*, 113 F.2d 364 (7th Cir.1940); *Texas Co. v. Todd*, 19 Cal.App.2d 174, 64 P.2d 1180 (1937).

21. The Court may reform a contract only when there is a mutual mistake of integration, *Restatement (Second) of Contracts* § 155 & comment a, unilateral mistake induced by fraudulent misrepresentation, *id.* § 166, or impossibility of performance, H. Hunter, *Modern Law of Contracts: Breach and Remedies* ¶ 12.03 & 12.04 (1986). "If, however, the parties make a written agreement that they would not otherwise have made because of a mistake other than one as to expression, the court will not reform a writing to reflect the agreement that it thinks they would have made." *Restatement (Second) of Contracts* § 155 comment b.

22. Thus it is the task of the parties, not of this Court, to refashion the agreement to reflect new developments. *See Coke VI* at 49-50. If there is a reasonable way to uphold the contracts despite changes in the business, the Court must give consideration to it. *Id.* at 59.

COUNT I

FINDINGS OF FACT

A. *Plaintiffs' Contentions*

1. In Count I, plaintiffs contend the Company breached the unamended contracts by supplying them with syrup sweetened with HFCS-55 from 1980-1987 and by charging them a syrup price based upon more costly sugar. Plaintiffs seek a declaratory judgment that the Company's unilateral change in the sweeteners violated their unamended contracts. They also seek monetary damages for the amount of

the alleged overcharge, prejudgment interest, and attorneys' fees. [4]

2. Plaintiffs seek damages equal to 100% of the difference between the sugar- based syrup price they were charged and a syrup price based upon what they contend was the "effective selling price" of HFCS-55.

3. Plaintiffs and the Company agree that in the event the Court awards monetary damages, the price of HFCS which should be used by the Court to calculate plaintiffs' damages should be the "market price" as that term is used in paragraph 7 of the Consent Decrees and paragraph FOURTH(d) of the bottle contracts. In *Coke III*, Judge Schwartz defined "market price" for sugar as:

> an average of the price per pound for refined granulated sugar of the grade and in the packaging unit in which it is principally sold to industrial users f.o.b. the refinery, as made known to such industrial users upon inquiry prior to sale by the ten refineries in the United States with the largest capacity and output during the first seven days of each calendar quarter, less any discounts, allowances, or rebates from that price which are available to industrial users or are made known to them upon inquiry prior to sale, but not including

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[4] Plaintiffs also seek a declaratory judgment that their unamended contracts entitle them to receive concentrate in lieu of syrup, and they assert that the Court should fashion a remedy to the current impasse between the parties by "interpreting" the unamended contracts to provide for the use of sweeteners other than sugar in the syrup and for the pass through of any resultant savings to the unamended bottlers. The Court will address these contentions in its analysis of Count II. *See infra* Count II at ¶¶ 97-105; 120-124; 145-146.

a standard two percent cash discount or any individually negotiated discounts, allowances or rebates.

Coke III at 1418.

4. Plaintiffs contend that there exists an "effective selling price" of HFCS which meets Judge Schwartz' definition of market price. They assert that the Court should use monthly averages of actual sales prices of HFCS-55 as a proxy for "effective selling price" or "market price" when it calculates their damages.

B. *The Company's Position*

5. The Company contends that plaintiffs are not entitled to the difference between a syrup price based upon the price of HFCS-55 and the sugar-based syrup price they were charged because pass-through of sweetener savings was a benefit conferred by the 1978 Amendment not signed by these plaintiffs.

6. In the alternative, the Company asserts that even if it breached plaintiffs' unamended contracts, plaintiffs are not entitled to damages because they have not been harmed. The Company contends plaintiffs received the benefit of their economic bargain because they received a syrup of like quality at the price for which they contracted.

7. In the event the Court finds a breach and determines that damages should be awarded, the Company asserts the Court should use the list price of HFCS, i.e., the prices published by the corn wet millers in trade publications, pricing letters and announcements, to calculate damages.

C. *Introduction*

8. The allegations in Count I are derived from the

Company's decision, announced January 25, 1980, to begin using high-fructose corn syrup (HFCS-55 or HFCS) in place of granulated sugar as the sweetener for Coca-Cola Bottlers' Syrup.

9. HFCS-55 is a liquid sweetener composed of 55% fructose, 42% glucose and approximately 3% oligasaccharides. Admitted Facts III.C. ¶ 161 at 81.[5]

10. HFCS-55 was unknown and did not exist in 1921. Admitted Facts III.C. ¶ 162 at 81. HFCS-55 is made by hydrolysis, which converts corn starch into a liquid through the use of chemical enzymes. Admitted Facts III.C. ¶ 161 at 81. This process did not exist until the 1960's and did not become commercially feasible until the 1970's. Admitted Facts, III.C. ¶ 163 at 81.

11. The substitution of HFCS for sugar does not adversely affect the quality of the Coca-Cola product. Admitted Facts III.D(i) ¶ 262 at 148 ("There is no organoleptic difference, *i.e.*, no difference in taste, feel, smell, or color, between Coca-Cola produced from syrup which contains 100% sucrose and Coca-Cola which is produced from syrup containing either 100% HFCS-55 or an authorized blend of HFCS and sucrose"); *see also* Tr. 1169 (W. Schmidt); Tr. 1425-26 (C. Schmidt); Tr. 3766 (Trombley); Tr. 4366 (Hanlon).

12. Since 1980, HFCS-55 has been less expensive than a comparable amount of sucrose with the same sweetening power. Admitted Facts, III.C., ¶ 168 at 83; III.C. ¶ 174 at 84.

13. On January 25, 1980, the Company, unilaterally and

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[5] Citations to "Admitted Facts" refer to the facts which the parties agree need no proof or which the parties agree were established in the prior summary judgment decision. These appear in the Consolidated Pretrial Order (Dkt. 848) at pages 17-202.

over the objection of the plaintiffs, announced that it would begin using a mixture of 50% HFCS-55 and 50% sugar to sweeten the syrup. On February 7, 1984, the Company announced an increase in the proportion of HFCS to sugar from 50%-50% to 75% (HFCS)-25% (sugar). On November 6, 1984, the Company announced an increase in the amount of HFCS-55 in Coca-Cola syrup to 100% of the sweetener.

14. From 1980 until December 1, 1987, the Company supplied all bottlers—amended and unamended—with syrup sweetened wholly or partially with HFCS. On December 1, 1987, in response to Judge Schwartz' decisions in *Coke III*, *Coke IV*, and *Coke V*,[6] the Company began to supply plaintiffs, that is, the unamended bottlers, with syrup sweetened with 100% granulated sugar from cane or beets.

15. During the time the Company supplied plaintiffs with HFCS-sweetened syrup, it continued to charge them a syrup price based upon the market price of sugar and calculated under the sliding scale pricing mechanism described in paragraphs 6 and 7 of the Consent Decrees and paragraph FOURTH(d) of the unamended bottle contract.

D. *The Unamended Contracts Require the Use of Sugar to Sweeten the Syrup*

16. Paragraph 10 of the Consent Decrees states: "The

[6] In *Coke III*, Judge Schwartz decided that "sugar" as that term is used in paragraph 10 of the Consent Decrees meant granulated sugar from cane or beets and did not include HFCS. In *Coke IV*, Judge Schwartz declined to reconsider the *Coke III* ruling or to certify it for immediate appeal. In *Coke V*, Judge Schwartz granted leave for plaintiffs to amend their complaint to assert Count II, demanding that they be supplied with syrup sweetened with HFCS. In the same opinion and order, Judge Schwartz denied plaintiffs' application for a preliminary injunction preventing the Company from supplying them exclusively with syrup sweetened 100% with granulated sugar from cane or beets.

[Company] contracts that the syrup sold and furnished by it to [the Parent Bottlers] is to be high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty two one-hundredths (5.32) pounds of sugar to each gallon of syrup." Paragraph FIRST of the unamended contracts required the parent bottler "to obtain and furnish to [the unamended actual bottler] ... sufficient syrup for bottling purposes to meet the requirements of [the actual bottler] ... from The Coca-Cola Company under the contract existing between [the parent bottler] and The Coca-Cola Company [the Consent Decrees]." Thus, it may be said that under paragraph FIRST of the unamended contracts, the parent bottler was required to supply the unamended actual bottler with the same syrup it received pursuant to paragraph 10 of the Consent Decrees. In this way, it may be said that paragraph FIRST of the unamended contracts incorporates the description of the syrup in paragraph 10 of the Consent Decrees as the syrup to be supplied to the unamended actual bottlers. In other words, the unamended contracts entitle the actual bottlers to receive the same "Bottlers Coca-Cola Syrup" described in paragraph 10 of the Consent Decrees. As previously indicated, Judge Schwartz ruled in *Coke III* that "[t]he effective present meaning of the term 'sugar' in paragraph 10 [of the Consent Decrees] is refined granulated sucrose from cane or beet, a definition that excludes HFCS-55." *Coke III* at 1406. Neither party contested this ruling.[7]

17. The Court finds that use of a sweetener other than sugar was not contemplated by the parties in 1921, who bargained for the requirement that the syrup be sweetened with

[7] In a conference conducted October 31, 1989, the Court offered to reconsider the *Coke III* rulings or to certify them for immediate appeal. Both parties declined the Court's offer. Dkt. 882.

not less than 5.32 pounds of sugar per gallon. Both the Company and the parent bottlers were familiar with the use of cheaper substitute sweeteners and variations in the sweetener strength. Consequently, they could have provided for the use of sweeteners other than sugar in the Consent Decrees and bottle contracts. The fact that they did not do so indicates that the parties bargained for the use of sugar as the only sweetener in the syrup and that they considered substitute sweeteners undesirable. These findings are evidenced by the numerous changes in the sweetener which occurred prior to 1921.

18. At the time it entered into the 1899 contract with Whitehead and Thomas, the Company manufactured only one version of Coca-Cola syrup and sold the same syrup for use in both the soda fountain and bottling businesses. R. 1244, 1714; Admitted Facts III.A. ¶ 30 at 26.

19. Whitehead and Thomas, as well as some of the actual bottlers, soon discovered that the bottled product was not as sweet as the fountain product. Admitted Facts III.C. ¶ 116 at 67; III.D. ¶ 281 at 152; IV.A. ¶ 12 at 163-64.

20. To eliminate the difference in taste, the bottlers experimented with different syrup to water ratios. Thomas was permitted to add "a simple syrup" to the product sold by the actual bottlers. Admitted Facts IV.A. ¶ 13 at 164. This simple syrup contained the artificial sweetener saccharin, as well as "Coca-Cola coloring" and "Coca-Cola acid." Admitted Facts III.C. ¶ 117 at 67; III.D. ¶ 282 at 152; IV.A. ¶ 14 at 164.

21. Thus, prior to the passage of the Pure Food and Drug Act, the syrup used in bottling contained some saccharin. PX1 (R.1814).

22. The Pure Food and Drug Act, which was adopted in 1906, was interpreted by the USDA to prohibit the use of saccharin in soft drinks. Admitted Facts III.A. ¶ 34 at 27; III.D. ¶ 284 at 152; IV.A. ¶ 68 at 172. Passage of the Pure Food and Drug Act forced the Company to change the formula for the syrup supplied to the bottlers, and the Company in conjunction with the parent bottlers developed a new syrup, which did not exist in 1899, for sale exclusively to the bottlers under the 1899 contract. Admitted Facts, III.A. ¶¶ 35, 37, 38 at 28-29; III.D. ¶ 285 at 152. The new formula altered slightly the taste of bottled Coca-Cola. *See* PX102.

23. Prior to 1906, the syrup also contained a soft sugar known as "Confectioner's A." PX711 at AR2303; Admitted Facts III.A. ¶ 31 at 27. This was eventually found unsatisfactory, and the Company switched to granulated sugar. PX711 at AR2303.

24. Between 1907 and 1921, the Company reduced the quantity of sugar in a gallon of Coca-Cola Bottler's Syrup from 6.36 pounds per gallon before World War I, PX766 at AZ0609, to 5.97 pounds per gallon during 1916-1918, PX220, and to 5.32 pounds per gallon by the time of the 1920 litigation.

25. Prior to the imposition of sugar quotas and price controls in 1917, cane sugar was the primary sweetener used in soft drinks. Admitted Facts III.C. ¶ 122 at 68. Sucrose, especially sucrose from cane, was the preferred sweetener in the soft drink bottling industry. Admitted Facts ¶ 123 at 68. During 1918, the Company used a number of cheaper sweeteners as substitutes for cane sugar in Coca-Cola bottlers' syrup. The Company used corn syrup, glucose, beet sugar, and invert sugar as substitutes for cane sugar in Coca-Cola Bottler's Syrup. Admitted Facts III.A. ¶ 52 at 32-33. Substitute sweeteners used by the Company during the

World War I period proved unsatisfactory. PX189; PX287; PX708.

26. The parties' familiarity with substitute sweeteners at the time of the 1920 litigation is further evidenced by the distribution by the USDA of a pamphlet entitled "Formulas for Sugar Saving Sirups." PX152. Copies of this pamphlet as published by USDA were widely publicized and reprinted by the Georgia Department of Agriculture (PX144; PX232), in trade journals directed at bottlers, including the *National Bottlers' Gazette* (PX172; PX208), and *The American Bottler* (PX147), and by suppliers to the soft drink industry (PX190). Discussion of the use of substitute sweeteners in newspapers was apparently noted by at least one bottler. PX226.

27. Many of the actual bottlers purchased concentrates from other manufacturers to bottle beverages other than Coca-Cola, such as ginger ale or various fruit-flavored drinks. Admitted Facts, III.C. ¶ 125 at 69. These bottlers would add sweetener to the concentrate. Many actual Coca-Cola bottlers who were faced with a curtailment of the bottling of ginger ale and fruit-flavored drinks from concentrates as a result of sugar shortages due to World War I, Admitted Facts, III.A. ¶ 48 at 31, requested copies of "Formulas for Sugar Saving Sirups" directly from the USDA. E.g., PX179; PX182-184; PX186; PX188; PX195; PX197-200; PX207; PX210; PX213-218; PX220; PX223-224; PX226; PX234; PX243; PX247-248; PX254; PX256; PX265. These bottlers included the Birmingham Coca-Cola Bottling Company, whose president, Crawford Johnson, was Chairman of the Special Committee of the Coca-Cola Bottlers' Association and an intervenor in the 1920 litigation. PX185; PX198.

28. In 1922, one Coca-Cola bottler wrote that he was familiar with the USDA's "Formula for Sugar Saving Sirups"

and that, in his opinion, substitute sweeteners were inadequate replacements for sugar. PX708; Admitted Facts III.A. ¶ 131 at 70-71.

29. Clearly, the parties to the 1920 litigation and 1921 Consent Decrees were aware of the availability of substitute sweeteners. Although use of a sweetener other than sugar was a possibility of which the parties were aware in 1920 and 1921, sugar was the only sweetener mentioned in paragraph 10's description of Coca-Cola Bottlers' Syrup. The history of the bottlers prior to the entry of the Decrees suggests that the last thing to which they would have agreed was the use by the Company of a sweetener made from corn syrup. The fact that these substitute sweeteners had proved unsatisfactory supports the finding that the bottlers bargained for the use of 5.32 pounds of sugar per gallon as the exclusive sweetening agent.

D. *Syrup Pricing Under the Unamended Contracts*

30. Paragraph 6 of the Consent Decrees describes a "sliding scale" pricing formula for the syrup described in paragraph 10 and sold by the Company to the parent bottlers as follows:

> 6. In order to promote the sale of Coca-Cola and enable the actual bottlers to compete with other beverages, the [Company] hereby agrees to sell such syrup to the bottlers purchasing from it at not exceeding one dollar and thirty cents ($1.30) per gallon, ... and an additional six cents (6¢) per gallon for such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per pound....

31. Paragraph FOURTH(d) of the unamended contracts describes the same base price and sliding scale pricing

formula for the syrup sold by the parent bottlers to the actual bottlers:

> [The actual bottler] agrees:
>
> (d) To buy of or through [the parent bottler] all the Coca-Cola syrup required or used by [the actual bottler] in the preparation for market of its bottled goods aforesaid, and to pay for said Coca-Cola syrup on the following scale of prices:
>
> One Dollar and Thirty ($1.30) cents per gallon delivered to any point in the above described territory where a plant may be established by the [first line bottler]; and an additional six cents (6¢) per gallon for such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per pound,....

32. Paragraph 7 of the Consent Decrees and paragraph FOURTH (d) of the unamended contracts describe the mechanism for determining the market price of sugar upon which the sliding scale is based:

> [T]he price of sugar is to be determined quarterly, January, April, July and October in each year, by averaging the market price of standard granulated sugar during the first week in such quarter, as quoted at the refineries by the ten refineries operating in the United States of America at the time, having the largest capacity and output.

Consent Decrees ¶ 7; see also Bottle Contract ¶ FOURTH(d).

33. The sliding scale pricing formula was the product of negotiations among the Company, the parent bottlers, and the actual bottlers which led to the entry of the Consent Decrees in 1921.

34. During the 1920 litigation, the bottlers paid a price for the syrup tied to the Company's actual cost of manufacture.

35. Prior to the 1920 litigation, the parent bottlers paid the Company a fixed price per gallon which was not based upon the cost of any ingredient. The 1899 contract between the Company and Whitehead and Thomas obligated the Company to sell to the bottlers their requirements of Coca-Cola syrup at a fixed price and required that the syrup be bottled under pressure of one atmosphere in proportions of not less than one ounce of syrup to eight ounces of water. The price of the Coca-Cola syrup supplied to Whitehead and Thomas was as shown on the wholesale price list of fountain syrup in effect at the time, which was attached as an exhibit to the 1899 contract. Admitted Facts III.A., ¶ 12 at 19-20.

36. By an undated amendment, the 1899 contract was amended to fix the syrup price at $1.00 per gallon, less a ten cent per gallon rebate to pay for labels and advertising matter to be provided by the Company at its actual cost. Admitted Facts, III.A. ¶ 13, at 20.

37. Prior to the passage of the Pure Food and Drug Act in 1906, the syrup used in bottling contained some saccharin. PX1 (R. 1814). The Pure Food and Drug Act was interpreted by the USDA to prohibit the use of saccharin in soft drinks. Admitted Facts III.A., ¶ 34 at 27; III.D. ¶ 284 at 152; and IV.A., ¶ 68 at 172. In response to passage of the Pure Food and Drug Act, the Company in conjunction with the parent bottlers developed a new saccharine-free syrup that did not exist in 1899 for sale exclusively to Coca-Cola bottlers under the 1899 contract. Admitted Facts III.A., ¶¶ 35, 37, 38 at 28-29; III.D., ¶ 285 at 152; IV.A. ¶ 68 at 172. The parent bottlers agreed to pay an additional two cents per gallon as the new syrup price, which two cents was offset by a reduction in the amount of

advertising materials for which they were required to pay pursuant to the 1899 contract from ten cents to eight cents. Admitted Facts, III.A., ¶ 35 at 28; IV.A. ¶ 70 at 173.

38. In 1915, the Company and the parent bottlers modified their 1899 contract as a result of passage of the 1914 Clayton Act. Admitted Facts III.A. ¶¶ 41-42 at 29-30. The 1915 Amendment formally incorporated the increase in the price of the syrup from the ninety cents stipulated in the 1899 contract to ninety-two cents per gallon and the reduction from ten cents to eight cents of the advertising material the parent bottlers were obligated to purchase for the syrup. Admitted Facts III.A. ¶ 42 at 30. The 1915 Amendment was the first instance in which the phrase "Bottler's Syrup" was used in the contracts. Admitted Facts, IV.A. ¶ 21 at 165.

39. The 1915 Amendment necessitated corresponding amendments in the contracts between the parent and actual bottlers. The actual bottlers' contracts were amended in 1916 to require the actual bottlers to pay $1.20 per gallon for the syrup (a twenty-eight cent profit for the parent bottlers) and to use the new Root bottle as the standard Coca-Cola bottle "using one ounce of Bottlers' Coca-Cola Syrup in a standard Coca-Cola bottle." *E.g.*, PX38 (Star/Shreveport); Admitted Facts III.A. ¶ 46 at 31. The actual bottlers' contracts as amended refer to syrup in the same manner as did the 1915 Amendments to the parent bottlers' contracts.

40. Refined granulated sugar was the principal and most expensive ingredient used in the manufacture of the syrup. PX766 (AZ0605, AZ0609, AZ0610, AZ0611). The price per pound of sugar had ranged between roughly 4.9 cents when the 1899 contract was executed and 4.65 cents when the fixed price of syrup was last amended in 1907. PX312.

41. World War I severely affected the price and supply

of sugar. Only the imposition of rigid price controls held the price of refined sugar at nine cents per pound. In 1917 the parent bottlers voluntarily agreed to a temporary price increase whereby they would pay the Company an additional five cents per gallon for Coca-Cola syrup because of the increased cost of sugar and the corresponding increased cost of manufacturing the syrup caused by the War. The temporary price increase was to be limited to the duration of the circumstances occasioned by the War. It was also conditioned on the parent bottlers being relieved from the obligation of purchasing eight cents of advertising matter with each gallon of syrup. The parent bottlers paid ninety-seven cents per gallon for the duration of the agreement. Admitted Facts III.A. ¶ 51 at 32.

42. After termination of federal price controls of sugar in September 1919, sugar prices rose rapidly until they exceeded twenty-three cents per pound in May-June 1920. Admitted Facts III.A. ¶ 54 at 33.

43. At the request of the Company the parent and actual bottlers agreed to "temporary amendments" which would expire in February 1, 1920. The temporary amendments allowed the Company to pass on to the parent bottlers the full cost of sugar above nine cents per pound, the price that had existed under the federal price controls and upon which the previous temporary price increase had been predicated. It was understood that the parent bottlers would not be required to purchase advertising materials, and that the actual bottlers would allow the parent bottlers to pass on the added cost of syrup to a ceiling of $1.50 per gallon. Admitted Facts III.A. ¶¶ 55-56 at 33-35. At the Company's request, the arrangement was extended until March 1, 1920.

44. This agreement represented the first time the parties

established a fluctuating price for the syrup based upon the actual cost of any ingredient. Admitted Facts III.A. ¶ 55 at 34.

45. At about the same time, the Company sought permanent relief from the fixed price contract. The Company proposed an amendment to the 1899 contract which would eliminate the limitations on the Company's power to raise syrup prices that existed by virtue of the ninety-two cent fixed price specified in the 1915 Amendment, grant the Company the right to pass on to the actual bottlers all increases in its total manufacturing costs, and guarantee the Company two- thirds of the profits and the parent bottlers one-third of the profits from the sale of Coca-Cola syrup to the actual bottlers. Admitted Facts III.A. ¶ 57 at 35.

46. The parent bottlers advised Harold Hirsch, counsel for the Company, that they would not enter into negotiations to amend their contracts with the Company unless the Company provided itemized information concerning the cost of manufacturing the syrup so they could verify the Company's manufacturing costs. Admitted Facts III.A. ¶ 58 at 35-36.

47. Beyond offering cost statements prepared by its accountants, which were rejected by the parent bottlers as insufficient, PX323; Admitted Facts III.A. ¶ 60 at 36, the Company refused to disclose the cost information, offering only "the integrity and good faith of The Coca-Cola Company." PX1 at 1580. The parents then rejected the Company's flexible pricing proposal.

48. The Company responded by announcing that it considered its contracts with the parent bottlers to be contracts at will which could be terminated by the Company on reasonable notice. Admitted Facts III.A. ¶ 59 at 36.

49. On February 27, 1920, after the exchange of a series of proposals and counterproposals, the parent bottlers notified the Company that all negotiations were terminated, and that all temporary pricing arrangements were cancelled as of March 1, 1920. The parent bottlers demanded that the Company comply with all aspects of the 1899 contract and 1915 Amendment as of March 1. Admitted Facts III.A. ¶ 65 at 39.

50. On March 2, 1920, the Company notified the parent bottlers that their contracts would be terminated on May 1, 1920. PX343; PX344. The Company then submitted a final settlement proposal on April 1, 1920, offering to appoint the parents as agents and distributors entitled to a royalty on each gallon of syrup distributed. The proposal also included a cost-plus pricing arrangement with the price to be adjusted semi-annually based upon a sworn statement from the Treasurer of the Company itemizing specific elements of the Company's costs. PX364; Admitted Facts, III.A. ¶ 68 at 40.

51. The Whitehead-Lupton Company rejected the proposal. PX368; PX369; Admitted Facts III.A. ¶ 69 at 40.

52. On April 13, 1920, the two principal parent bottlers filed suit in the Fulton County, Georgia Superior Court to enjoin the Company from terminating their contracts. Admitted Facts III.A. ¶ 71 at 41.

53. A temporary restraining order was entered which prohibited the Company from selling Coca-Cola syrup to anyone other than the parent bottlers. PX6; Admitted Facts III.A. ¶ 71 at 41.

54. The Bottlers' Association employed J.B. Sizer, a Chattanooga lawyer, to represent the interests of the actual bottlers in the litigation. Admitted Facts III.A. ¶ 72 at 41. Sizer reported to a special committee appointed by the

Bottlers' Association, and his fees were paid by the Association, PX385; PX391, and by assessments of bottlers in the Whitehead-Lupton and Thomas territories based on the gallonage of Bottlers' Coca-Cola Syrup used by each bottler. PX689-95; PX697-98; PX701; PX704-706; Admitted Facts III.A. ¶ 72 at 41.

55. Six actual bottlers intervened in support of the parent bottlers. Admitted Facts V.A. ¶ 184 at 190.

56. The Fulton County suit was voluntarily dismissed by the parent bottlers on May 30, 1920, and it was refiled on June 1, 1920 in the United States District Court for the District of Delaware.

57. On June 10, 1920, the parties agreed to the entry of an order which required the Company to supply the bottlers' requirements of Coca-Cola syrup during the pendency of the litigation. The order fixed the price paid by the actual bottlers to the parent bottlers at $1.72 per gallon until November 1, 1920. In the event the court had not reached a decision on the application for interlocutory injunctions by November 1, the order provided that after that date the syrup price would be increased or decreased from the fixed $1.72 price based upon increases or decreases in the Company's actual costs of manufacture of the syrup.

58. Prior to the entry of this order, the Company had purchased a year's supply of refined cane sugar at about twenty cents per pound, a price near the top of the market. Admitted Facts III.A. ¶ 77 at 43. During negotiations leading to the June 10 order, the Company failed to disclose fully that it had entered into long-term sugar contracts at prices near the top of the market. The bottlers were led to understand that the Company had in fact entered into favorable long-term sugar contracts at a price lower than the current market

price. PX1 (R. 1608); PX474 (letter from parent bottlers to Company dated October 30, 1920) ("[W]hen the working agreement was entered into the methods employed by The Coca-Cola Company in purchasing sugar were discussed with you [Charles Candler, President of the Company], you represented to us that The Coca-Cola Company had a contract with one of the largest refiners in the Country for a sufficient quantity of sugar to meet your requirements for the year 1920, the price to be determined by the market price every Monday morning.").

59. Beginning in June 1920, the market price of sugar began declining. By November 1920 it had fallen to eleven cents per pound. PX311; PX492. The price to the actual bottlers remained fixed at $1.72, however, causing them to suffer a substantial loss in sales volume. The Chairman of the Coca-Cola Company reported the Company's total sales volume of syrup (including both bottle and fountain syrup) declined 53% in September 1920 and 50% in October 1920 because of the high price of the syrup. *Coke III* at 1394.

60. The bottlers expected price relief on November 1, based upon their understanding of the Company's sugar contracts. Instead, the Company, in order to recoup the cost of its inventories of high priced sugar, announced syrup price increases in November 1920, December 1920 and January 1921.

61. The Company represented that its costs of manufacture had increased because of long term sugar purchases at high prices. The parent bottlers, in disbelief, demanded verification of the Company's figures. The bottlers' audit showed discrepancies, and the parties were unable to reconcile their figures or even agree on items to be included in the cost calculation. *Coke III* at 1394.

62. In November 1920, Crawford Johnson, the Birmingham bottler, President of the Bottlers' Association, and an intervenor in the lawsuit, met with W.C. Bradley, Chairman of the Board of the Company. Admitted Facts III.A. ¶ 80 at 44. Bradley told Johnson that in March 1920 the Company had purchased a year's supply of sugar at twenty cents per pound. Because of the decrease in volume, the Company would be unable to get rid of its inventories of this high priced sugar until April 1, 1921. He also informed Johnson that the Company could not afford to absorb the loss from the sugar without destroying its credit and going into bankruptcy. PX485; Admitted Facts III.A. ¶ 80 at 44.

63. Thus the bottlers discovered that by tying the price they paid for syrup to the Company's actual cost, they exposed themselves and insulated the Company from the hazards of the marketplace and the Company's own poor judgment in sugar purchases.

64. The parties eventually agreed to the sliding scale pricing mechanism set forth in paragraphs 6 and 7 of the Consent Decrees and paragraph FOURTH(d) of the unamended contracts. The sliding scale pricing mechanism was designed to prevent the type of situation which occurred under the June 10 order. By tying the price of syrup to the market price of sugar, rather than the Company's actual cost, the bottlers were protected from future bad judgment on the part of the Company in its long-term sugar purchasing. In addition, tying the price of the syrup to the market price of sugar created a pricing mechanism based upon an objective factor and gave the bottlers a way to independently verify the price charged by the Company.

65. From the Company's point of view, the sliding scale pricing mechanism was preferable to the fixed price in the

1899 contract because it provided a way for the Company to recoup its increased costs when the price of the most expensive ingredient in the syrup—sugar—increased.

66. The pricing scheme and the events leading to its creation show that the term "sugar" as it is used in paragraphs 6 and 7 of the Consent Decrees and paragraph FOURTH(d) of the unamended contracts has the same meaning as the term as it used in paragraph 10 of the Consent Decrees.

67. Paragraph 10 of the Consent Decrees is both a quality-control and a price- protecting provision. The requirement of "high grade standard Bottlers Coca-Cola Syrup" and the requirement of at least 5.32 pounds of sugar per gallon address the quality of the syrup. The requirement that the syrup contain not less than 5.32 pounds of sugar per gallon addresses price as well as quality by ensuring the Company cannot reduce the amount of sugar in the syrup or use a cheaper sweetener to evade the pricing provisions of paragraphs 5, 6 and 7 of the Consent Decrees. *See Coke III* at 1402.

68. Moreover, the great majority of settlement proposals from the bottlers in 1920-1921 were predicated upon the use of sugar to sweeten the syrup. *E.g.*, PX557 ("The basic cost of syrup per gallon ... based on ten cent sugar is $1.04 per gallon and that the future price shall be on a sliding scale of the price of sugar ... figured on the basis of 5.32 pounds of standard granulated sugar to the gallon of syrup"); *see also* PX504; PX583; PX607. These show that the parties assumed that the Company would continue to use at least 5.32 pounds of sugar as the sweetener indefinitely. The base price of $1.175 per gallon paid by the parents under paragraph 5 of the Consent Decrees was calculated on the cost of 5.32 pounds of sugar per gallon. PX1 (R. 1605- 06).

69. Because both the base price and the escalator provi-

sions were premised on the market price of the amount of sweetener then in use, the Court finds it highly unlikely that the parties could have intended the application of a sugar-based pricing formula to a syrup that did not contain sugar. The Court now turns to the question of which party was intended to benefit from a decrease in the price of the sweetener.

70. Settlement negotiations between the parties resumed on November 30, 1920, slightly more than three weeks after the Court's ruling in favor of the parent bottlers. PX503; PX504.

71. The interests of the actual bottlers were initially represented by C.V. Rainwater, the Secretary-Treasurer of the Whitehead-Lupton Company. J.B. Sizer, the attorney employed by the Bottlers' Association and the intervening bottlers, was kept apprised by Rainwater and the parent bottlers' counsel of the negotiations. Admitted Facts, III.A. ¶ 83 at 45. The Company was represented by W.C. Bradley. *See* PX504; PX534. Between November 1920 and April 1921, Rainwater and Bradley exchanged a series of proposals for the settlement of the litigation, none of which were successful. Admitted Facts, III.A. ¶ 82 at 44-45.

72. In a letter from Sizer to Horace Ward (an attorney for the parents), dated December 17, 1920, Sizer recommended that the parties focus on two issues: (1) the perpetuity of the contracts; and (2) a sliding scale which would provide the Company with a "reasonable profit." PX523. The term "reasonable profit" indicates that Sizer expected the Company to derive some profit from use of the sliding scale price mechanism. At the same time, it indicates that Sizer and his clients did not contemplate that the Company would receive 100% of the profits from a decrease in the cost of sugar.

73. Under the pricing provisions of the Consent Decrees and unamended contracts, the unamended bottlers pay a base price of $1.30 per gallon of sugar-sweetened syrup so long as the price of sugar remains at 7¢ per pound or less. The bottlers pay an additional 6¢ per gallon for every 1¢ increase in the price of sugar over 7¢ per pound.

74. When the price of sugar is less than 7¢ per pound, the Company derives any benefits from a decrease in the price of sugar, assuming the Company purchases sugar at market price. Suppose, for instance, that the price of sugar is 7¢ per pound. The bottlers would pay $1.30 per gallon of syrup. If the price of sugar were to decrease to 6¢ per pound, the bottlers would continue to pay the base price of $1.30 per gallon of syrup. One-hundred percent of the benefits in terms of lower cost of manufacturing the syrup due to the decrease in the price of sugar would accrue to the Company.

75. Conversely, when the price of sugar is greater than 7¢ per pound, one-hundred percent of the benefits from a decrease in the price of sugar accrue to the bottlers. For example, if the price of sugar was 17¢ per pound, the bottlers would pay $1.90 per gallon of syrup ($1.30 base price per gallon + $.60 (6¢ per gallon for every 1¢ increase in the price of sugar over 7¢ per pound)). If the price of sugar fell to 12¢ per pound, the bottlers would then pay only $1.60 per gallon of syrup ($1.30 base price + $.30 (6¢ per gallon for every 1¢ increase in the price of sugar over 7¢ per pound)).

76. Thus, for a sugar-sweetened product, the pricing provisions of the Consent Decrees and the unamended contracts provide that when the price of sugar is less than 7¢ per pound or when the bottlers are paying the base price of $1.30

per gallon for syrup, one-hundred percent of any savings due to a decrease in the price of sugar accrues to the Company. Conversely, when the price of sugar is greater than 7¢ per pound or when the bottlers are paying a syrup price greater than the base price of $1.30 per gallon, one-hundred percent of the savings resulting from a decrease in the price of sugar accrues to the bottlers.

77. Further, when the price of sugar is greater than 7¢ per pound, the Company receives an additional .68¢ per gallon for each cent by which the price of sugar exceeds 7¢ per pound. This .68¢ represents the difference between the actual cost to the Company of sweetening the syrup with 5.32 pounds of sugar purchased at market price and the additional 6¢ the bottlers pay for each gallon of syrup for every 1¢ increase in the price of sugar over 7¢ per pound.

78. At all times relevant to this litigation, the prices of both sugar and HFCS as alleged by both plaintiffs and defendants have exceeded 7¢ per pound.

79. At all times relevant to this litigation, the price of bottle syrup, whether calculated based upon the price of sugar or the price of HFCS as alleged by either party would exceed $1.30 per gallon. The Court now turns to the issue of what is the "market price" of HFCS.

80. While plaintiffs have proven that the wet millers sell a substantial amount of HFCS at prices below their list prices, Tr. at 6322 (Nelson); PX2824 at 78 (deposition of J. Nichols of Staley Manufacturing Co.); PX2828 at 88 (deposition of James Holsinger of Hubinger Company), this fact alone does not prove that there exists an "effective selling price" of HFCS less than list price which meets Judge Schwartz' definition, nor does it prove that the monthly sales

averages compiled by plaintiffs would reflect such an "effective selling price" if such a price does exist.

81. The monthly sales averages do not satisfy Judge Schwartz' definition of market price because they include sales prices of HFCS not of the same grade which would be sold to certain industrial users, including soda manufacturers. PX2823 at 34 (deposition of Richard Wetherhall of Archer-Daniels Midland Co.); PX2824 at 115-16 (deposition of J. Nichols of Staley Manufacturing Co.); PX2825 at 107 (deposition of Fred Ash of American Maize Products, Inc.); PX2827 at 21 (deposition of Dennis Cosgrove of Cargill, Inc.); PX2829 at 113-114 (deposition of J.P. Nolan of C.P.C. International).

82. Further, some of the sales prices included in the monthly averages are net prices from which the 2% cash discount excluded by Judge Schwartz has been deducted. PX2823 at 28 (deposition of Richard Wetherhall of Archer-Daniels Midland Co.); PX2824 at 29 (deposition of J. Nichols of Staley Manufacturing Corp.); PX2825 at 66 (deposition of Fred Ash of American Maize Products, Inc.).

83. The monthly averages include sales prices on dates other than the first seven days of the calendar quarter, as required by Judge Schwartz' definition. In addition, the prices at which actual sales are made shed very little light on the prices that the wet millers would actually quote upon inquiry prior to sale, especially since the wet millers consider the information regarding their actual sales to be confidential. PX2823 at 34-35 (deposition of Richard Wetherhall of Archer-Daniels Midland Co.); PX2823 at 140 (deposition of Lawrence Bohr of Archer-Daniels Midland Co.); PX2824 at 112-13 (deposition of J. Nichols of Staley Manufacturing Co.);

PX2825 at 107-08 (deposition of Fred Ash of American Maize Products, Inc.); PX2826 at 58-59 (deposition of Michael Urbanic of Cargill, Inc.); PX2828 at 137-38 (deposition of James Holsinger of Hubinger Co.); PX2829 at 130 (deposition of J.P. Nolan of C.P.C. International). Moreover, no publication publishes actual sales prices other than list prices. PX2828 at 139, 145 (deposition of James Holsinger of Hubinger Co.); PX2829 at 130 (deposition of J.P. Nolan of C.P.C. International).

84. In fact, several wet millers stated that in response to Judge Schwartz' definition, they would give their list prices. PX2825 at 110-111 (deposition of Fred Ash of American Maize Products, Inc.); PX2826 at 60-61 (deposition of Michael Urbanic of Cargill Inc.); PX2829 at 147-49 (deposition of J.P. Nolan of C.P.C. International).

85. The wet millers also testified that they do offer and sell at least some HFCS at list price. *E.g.*, PX2826 at 55 (deposition of Michael Urbanic of Cargill, Inc.); PX2829 (deposition of J.P. Nolan of C.P.C. International).

86. Some of the wet millers considered all sales made below list price to be "individually negotiated," *e.g.*, PX2825 at 95 (deposition of Fred Ash of American Maize Products, Inc.), while others indicated that salespersons were required to obtain approval before consummating a sale at a price below list. PX2829 at 133 (deposition of J.P. Nolan of C.P.C. International); PX2823 at 114, 138-39 (deposition of Lawrence Bohr of Archer-Daniels Midland Co.).

CONCLUSIONS OF LAW

87. When interpreting a contract, the primary function of the Court is to ascertain the intention of the parties. 4 *Williston on Contracts* § 601 at 303- 05.

88. In so doing, the Court should give the greatest weight to the express language of the contract itself, *Restatement (Second) of Contracts* § 203(b) at 93; *see also United States v. Armour & Co.*, 402 U.S. 673, 678, 91 S.Ct. 1752, 1755-56, 29 L.Ed.2d 256 (1971), as the words themselves are the best and most important evidence of the intention of the parties. 4 *Williston on Contracts* § 610A at 514. The Court should place even greater emphasis on the words of the Consent Decrees, since the decrees represent a compromise between the parties and consequently do not reflect 100% of the intentions of either party. *United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757-58, 29 L.Ed.2d 256 (1971). When the words of the contracts or the Consent Decrees are ambiguous, the Court may look to other indicia of the parties' intent, including the circumstances surrounding the making of the contract and course of performance. *Halderman v. Pennhurst State School and Hosp.*, 901 F.2d 311, 319 (3d Cir.1990), *cert. denied*, —- U.S. ——, 111 S.Ct. 140, 112 L.Ed.2d 107 (1990); *Allen-Myland, Inc. v. International Business Machines Corp.*, 746 F.Supp. 520, 542 (E.D.Pa.1990); *Restatement (Second) of Contracts* §§ 202 & 203(b). These indicia are secondary, however, to the actual contractual language.

89. A plain reading of the Consent Decrees and unamended contracts compels the conclusion that the syrup sold to the unamended bottlers pursuant to the unamended contracts must be sweetened with 5.32 pounds of granulated sugar from cane or beet per gallon. This conclusion is derived from the description in paragraph 10 of the Consent Decrees that the syrup shall contain 5.32 pounds of sugar per gallon. It is further supported by the fact that use of 5.32 pounds of sugar per gallon forms the basis of the pricing provisions of both the Consent Decrees and unamended contracts.

90. The plain language of the Consent Decrees and unamended contracts is supported by the evidence of the parties' course of dealing prior to 1921, which demonstrates that the parties were aware of the availability of substitute sweeteners and chose not to provide for their use in the syrup.

91. The Court should give effect to the intention of the parties at the time the unamended contracts were executed. The Court should put itself in the position of the parties looking forward from the time they entered into the contracts and Consent Decrees. The Court should not view the contracts and Consent Decrees from a position of hindsight. *Generally, 4 Williston on Contracts* § 607. The parties in 1921 contemplated only one product—Coca-Cola syrup sweetened with 5.32 pounds of granulated sugar per gallon.

92. As the contractual arrangements stood in 1921, the Company would be required to seek the consent of the parent bottlers to amend paragraph 10 of the Consent Decrees in order to substitute another sweetener for 5.32 pounds of granulated sugar per gallon of syrup. Consequently, the Court adopts Judge Schwartz' previous finding that paragraph 10 of the Consent Decrees required the Company to obtain the consent of the parent bottlers prior to changing the sweetener in the syrup. *Coke III* at 1403.

93. As of 1975, the Company had acquired all of the parent and subparent bottlers and assumed their obligations toward the actual bottlers. Admitted Facts III.A. ¶ 110 at 55. The Company's acquisition of the parent bottlers in the years since 1921 does not, however, leave it free to deviate unilaterally from paragraph 10 of the Consent Decrees. Under paragraph FIRST of the unamended contracts, the unamended bottlers are entitled to receive the same syrup received by the parent bottlers pursuant to paragraph 10 of the Consent

Decrees, i.e., high grade standard Coca-Cola Bottlers Syrup which shall contain 5.32 pounds of sugar per gallon of syrup. *Coke V* at 916. Consequently, upon dissolution of the parent and subparent bottlers, the Company was required to obtain the consent of the unamended bottlers prior to supplying them with syrup which did not contain 5.32 pounds of sugar per gallon.

94. The Company's unilateral substitution of HFCS for sugar in the syrup may be construed as an offer to amend paragraph 10 and the unamended contracts to provide for use of HFCS as the sweetener in the syrup. In order for the terms of a contract to be amended, both parties must manifest assent to the changed terms. If one party alters its performance, such alteration may be considered as an offer to amend the contract, and assent by the other party will be treated as an acceptance of the offer to substitute the altered terms. *Restatement (Second) of Contracts* § 287 & comment a. Plaintiffs clearly have not manifested assent to amendment of their unamended contracts as they incorporate paragraph 10 of the Consent Decrees to include HFCS in the absence of a corresponding amendment to the pricing provisions.

95. The Company has not obtained plaintiffs' consent to substitute HFCS for granulated sugar from cane or beet as the sweetener in Coca-Cola beverage syrup, and consequently, the unamended contracts have not been amended to provide for the use of HFCS in place of sugar.

96. The Court concludes the Company's unilateral substitution of HFCS for granulated sugar from cane or beet in the syrup supplied to plaintiffs from 1980-1987 without plaintiffs' consent was a breach of their right under the unamended contracts to receive the same syrup which the Company was obligated to provide the parent bottlers

pursuant to paragraph 10 of the Consent Decrees.

97. The Court concludes that the Company also breached the unamended contracts by charging plaintiffs a syrup price based upon the price of sugar for a syrup which did not contain 5.32 pounds of sugar per gallon. A plain reading of the Consent Decrees and unamended contracts reveals an inextricable linkage between the syrup pricing provisions and the use of 5.32 pounds of sugar per gallon to sweeten the syrup.

98. The Court agrees with and hereby adopts Judge Schwartz' finding that paragraph 10 of the Consent Decrees serves both a quality control function and a price-protecting function. *Coke III* at 1402. By linking the syrup price to the use of 5.32 pounds of sugar per gallon, the parties in 1921 ensured the Company could not evade the pricing provisions by decreasing the amount of sugar used and thus diluting the strength of the syrup or by using a cheaper sweetener. *Id.*

99. The Court concludes that the linkage between the quality statement in paragraph 10 of the Consent Decrees as incorporated into the unamended contracts and the syrup pricing provisions is a fundamental assumption of the unamended contracts and Consent Decrees which may be contravened only by an amendment to the contracts or Decrees. As previously stated, plaintiffs have not manifested assent to the Company's offer to unlink the use of 5.32 pounds of sugar per gallon and the pricing provisions by supplying HFCS-sweetened syrup to plaintiffs at a sugar-based price. At the same time, the Company has not manifested assent to amending both paragraph 10 and the pricing provisions to allow for provision of HFCS-sweetened syrup at an HFCS-based syrup price. Consequently, the unamended contracts and the Consent Decrees remain unamended and require

that the syrup be sweetened with 5.32 pounds of granulated sugar from cane or beet at a syrup price based upon the price of sugar.

100. The Court concludes that, by providing plaintiffs with an HFCS-sweetened syrup at a sugar-based price, the Company breached the linkage between the use of 5.32 pounds of sugar per gallon of syrup as required paragraph 10 of the Consent Decrees as incorporated into the unamended contracts and the pricing provisions and violated a fundamental assumption of both the Consent Decrees and unamended contracts.

101. As compensation for the Company's breach, plaintiffs are entitled to "expectation damages," or damages which would restore the fundamental assumption of their contracts. *See Restatement (Second) of Contracts* § 347; *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 634 (3d Cir.1984). Because the price of sugar has at all times relevant to this suit been greater than 7¢ per pound so that the bottlers have at all relevant times paid a syrup price greater than the base price of $1.30 per gallon, the inextricable linkage between the use of 5.32 pounds of sugar per gallon and the pricing provisions can be restored only by awarding plaintiffs one-hundred percent of the savings resulting from the use of the cheaper HFCS in place of sugar.

102. In light of the evidence in the record regarding the pricing of HFCS, the Court concludes that the list price of HFCS most closely approximates the "market price" as that term was defined by Judge Schwartz for purposes of the Consent Decrees and unamended bottle contracts.

103. Consequently, plaintiffs' damages should be calculated by subtracting the list price of HFCS-55 from the list price of sugar in each relevant quarter and multiplying by

the number of gallons of syrup purchased by each plaintiff, adjusting for the actual percentage of HFCS-55 (25%, 50%, 75% or 100%) used in the syrup each quarter.

104. In addition to these actual damages, plaintiffs are entitled to prejudgment interest. Although the Court denied plaintiffs' motion to amend the pretrial order to assert specifically a right to prejudgment interest, plaintiffs preserved their claim for prejudgment interest in the pretrial order under the heading "Statement of What Plaintiffs Expect to Prove: Count One:"

> Plaintiffs will prove that they are entitled to recover past damages for the period April 1980 through August 31, 1987 in an amount per gallon that reflects the difference between the sugar price used by The Coca-Cola Company in its syrup price notices and the market price of HFCS-55, *plus interest*.

Consolidated Pretrial Order at 440-41 (Dkt. 848) (emphasis added).

105. In a diversity case, when the contract fails to provide for prejudgment interest, the Court must look to the law of Delaware, the forum state, for determining the availability of prejudgment interest. *American Original Corp. v. Legend, Inc.*, 689 F.Supp. 372, 383 (D.Del.1988).

106. When a contract does not include a choice of law provision regarding the availability of prejudgment interest, the Delaware courts have concluded that the subject of prejudgment interest is governed by the substantive law of the state wherein the contract was to be performed. *Cooper v. Ross & Roberts, Inc.*, 505 A.2d 1305, 1306 (Del.Super.1986).

107. Of the seventeen jurisdictions involved in this liti-

gation, the majority—twelve—make prejudgment interest available in contract claims when the amount claimed is liquidated or is capable of being made certain by calculation: Arkansas, Ark. Const., art. 19, § 13(d)(i); *Wooten v. McClendon*, 272 Ark. 61, 612 S.W.2d 105 (1981) (test for availability of prejudgment interest is whether the claim is capable of exact determination); Arizona, Ariz.Rev.Stat.Ann. § 44-1201(A); *Homes & Son Constr. Co. v. Bolo Corp.*, 22 Ariz.App. 303, 526 P.2d 1258 (1974) (prejudgment interest available for claims wherein the evidence furnishes data which, if believed, makes it possible to compute claim with exactness); Illinois, Ill.Rev.Stat.1983, ch. 17, para. 6402; *Alguire v. Walker*, 154 Ill.App.3d 438, 107 Ill.Dec. 279, 506 N.E.2d 1334 (1987) (prejudgment interest available where damages are liquidated or subject to exact computation); Minnesota, Minn.Rev.Stat.Ann. § 549.09 (prejudgment interest available from commencement of action or date of first written settlement demand regardless of whether damages are readily ascertainable); *Solid Gold Realty, Inc. v. Mondry*, 399 N.W.2d 681 (Minn.App.1987) (prejudgment interest available from date claim accrued to date action commences on liquidated claims and when damages are readily ascertainable by computation or reference to generally recognized standards such as market value); Missouri, Ann.Mo.Stat. § 408.040(2); *Ohlendorf v. Feinstein*, 670 S.W.2d 930 (Mo.App.1984) (prejudgment interest allowed on liquidated claims and where amount due is readily ascertainable by computation according to recognized standards); North Carolina, Gen.Stat.N.C. § 24-5; *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973) (pre- judgment interest available if amount due is ascertainable from the contract itself or from the relevant evidence); *Bond v. Pickett Cotton Mills*, 166 N.C. 20, 81 S.E. 936 (1914) (same); North Dakota, N.D.C.C. § 32-03-04; *Metcalf v.*

Security Internat'l Ins. Co., 261 N.W.2d 795 (N.D.1977) (prejudgment interest available if the amount due is ascertainable by calculations in accordance with the proper construction of the contract); Ohio, Ohio R.C. § 1343.03(A); *Shaker Savings Ass'n v. Greenwood Village, Inc.*, 7 Ohio App.3d 141, 454 N.E.2d 984 (1982) (prejudgment interest available where amount due is capable of ascertainment by mere computation or subject to reasonably certain calculations by reference to existing well-established values); Oklahoma, 23 O.S.1981 § 6; *Withrow v. Red Eagle Oil Co.*, 755 P.2d 622 (Okla.1988) (prejudgment interest available when amount due is capable of ascertainment by calculation or resort to well-established market values); *Sandpiper North Apts., Ltd. v. American Nat'l Bank & Trust Co.*, 680 P.2d 983, 993 (Okla.1984) (same); Pennsylvania, 41 P.S. § 202 (Purdon's Supp.1990); *Fiat Motors of North Am. v. Mellon Bank, N.A.*, 827 F.2d 924 (3d Cir.1987) (Pennsylvania has adopted *Restatement (Second) of Contracts* § 354, which allows for prejudgment interest when the amount due is a definite sum in money or where performance due is fixed or has an ascertainable monetary value); *Fernandez v. Levin*, 519 Pa. 375, 548 A.2d 1191 (1988) (same); Texas, Tex.Civil Statutes art. 5069-1.03 (prejudgment interest due on contracts ascertaining a sum payable); *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929 (Tex.1988) (prejudgment interest statute has been construed liberally); *Federal Life Ins. Co. of Chicago v. Kriton*, 112 Tex. 532, 249 S.W. 193 (1923) (same); Wisconsin, *Johnson v. Pearson Agri-Systems, Inc.*, 119 Wis.2d 766, 350 N.W.2d 127 (1984) (prejudgment interest available as a matter of common law when the amount claimed is "liquidable" because there is a reasonably certain standard of measurement by the correct application of which one can ascertain the amount owed).

108. The remaining five jurisdictions allow prejudgment

interest in the discretion of the factfinder: California, Cal.Civ.Code § 3287 (allowing prejudgment interest of right for damages certain or capable of being made certain by calculation and in the discretion of the court where the contract claim is unliquidated); Kentucky, *General Accident Fire & Life Assurance Corp. v. Judd*, 400 S.W.2d 685 (Ky.1966) (quoting *Congoleum-Nairn v. M. Livingston & Co.*, 257 Ky. 573, 78 S.W.2d 781, 785 (1935)) (prejudgment interest a matter of right in liquidated claims and a matter of discretion in unliquidated claims); Mississippi, Miss.Code § 75-17-7 (1990 Supp.) (allowing prejudgment interest dating from no earlier than the filing of the complaint); *Merchants & Marine Bank v. Douglas-Guardian Warehouse Corp.*, 801 F.2d 742 (5th Cir.1986); *Glantz Contracting Co. v. General Electric Co.*, 379 So.2d 912 (Miss.1980); New Mexico, N.M.S.A. § 56-8-4; Virginia, Va.Code § 8.01-382; *J.W. Creech, Inc. v. Norfolk Air Conditioning Corp.*, 237 Va. 320, 377 S.E.2d 605 (1989).

109. Defendant argues that the twelve jurisdictions which allow prejudgment interest only in cases where the sum claimed is liquidated or capable of ascertainment by calculation would not award prejudgment interest in this case because the amount of damages has been subject to heated dispute. In light of its view that prejudgment interest would be unavailable in these twelve jurisdictions, the Company urges the Court to use its discretion to deny prejudgment interest to plaintiffs from the remaining five jurisdictions.

110. The fact that the amount of damages is disputed, however, does not necessarily render plaintiffs' claim under Count I unliquidated or incapable of ascertainment by calculation in the twelve jurisdictions that base the award of prejudgment interest on that particular characteristic of the damages claim. *Homes & Son Constr. Co. v. Bolo Corp.*, 22

Ariz.App. 303, 526 P.2d 1258 (1974) (mere difference of opinion as to amount due does not preclude award of prejudgment interest); *Solid Gold Realty, Inc. v. Mondry*, 399 N.W.2d 681 (Minn.App.1987) (same); *Laycock v. Parker*, 103 Wis. 161, 79 N.W. 327 (1899) (same); *see also United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985) (same).

111. Moreover, the fact that the Court has determined that the contract language indicates that the list price of HFCS, rather than the so-called "market price" urged by plaintiffs, should be used to calculate plaintiffs' damages does not necessarily preclude recovery of prejudgment interest. *Wilson v. Lester Hurst Nursery, Inc.*, 269 Ark. 19, 598 S.W.2d 407 (1980) (prejudgment interest is available even though plaintiff did not recover the full amount sued for, so long as the court was able to calculate the amount owed); *Koyer v. Detroit Fire & Marine Ins. Co.*, 9 Cal.2d 336, 70 P.2d 927 (1937) (decided under Civil Code § 3287(a)) (prejudgment interest available where amount awarded by jury conformed closely to plaintiff's claimed loss in the proof of claim).

112. The Court must therefore determine whether plaintiffs' damages under Count I are sufficiently determinable to make prejudgment interest available to plaintiffs in the twelve jurisdictions which require that claims be liquidated or ascertainable by calculation.

113. A claim may be sufficiently determinable if it can be ascertained by resort to well-established market values, *Sandpiper North Apts., Ltd. v. American Nat'l Bank & Trust Co.*, 680 P.2d 983 (Okla.1984); *Solid Gold Realty, Inc. v. Mondry*, 399 N.W.2d 681 (Minn.App.1987), or by computation according to a recognized standard, *Ohlendorf v. Feinstein*, 670 S.W.2d

930 (Mo.App.1984); *Shaker Sav. Ass'n v. Greenwood Village, Inc.*, 7 Ohio App.3d 141, 454 N.E.2d 984 (1982); *Johnson v. Pearson Agri-Systems, Inc.*, 119 Wis.2d 766, 350 N.W.2d 127 (1984).

114. Further, some courts have made prejudgment interest available when the amount of the claim may be readily calculated from evidence adduced at trial, *Robertson Companies, Inc. v. Kenner*, 311 N.W.2d 194 (N.D.1981); *Levy-Zentner Co. v. Southern Pacific Transp. Co.*, 74 Cal.App.3d 762, 142 Cal.Rptr. 1 (1977) (decided under Civil Code § 3287(a)); *Homes & Son Constr. Co. v. Bolo Corp.*, 22 Ariz.App. 303, 526 P.2d 1258 (1974); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973); *Bond v. Pickett Cotton Mills*, 166 N.C. 20, 81 S.E. 936 (1914), or from the face of the contract itself, *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558 (Tex.1984); *Metcalf v. Security Internat'l Ins. Co.*, 261 N.W.2d 795 (N.D.1977); *Bond v. Pickett Cotton Mills*, 166 N.C. 20, 81 S.E. 936 (1914); *Restatement (Second) of Contracts* § 354 comment c (Section 354 has been adopted by the Pennsylvania courts) ("The sum due is sufficiently definite if it is ascertainable from the terms of the contract, as where the contract fixes a price per unit of performance....").

115. An award of prejudgment interest may be seen as a way to compensate a plaintiff who has been deprived of the use of his money over a period of time. *Johnson v. Pearson Agri-Systems, Inc.*, 119 Wis.2d 766, 350 N.W.2d 127 (1984) (citing *Laycock v. Parker*, 103 Wis. 161, 79 N.W. 327 (1899)). Many jurisdictions require that prejudgment interest be awarded only upon liquidated or determinable claims because defendant could avoid accrual of interest simply by tendering the calculated amount. Id.; *see also Parker v. Hartzell Propeller, Inc.* 291 Minn. 513, 189 N.W.2d 499 (1971) ("The question is not

whether the parties argued on the amount of damages but whether defendant could have determined the amount of his potential liability...."); *Fed. Life Ins. Co. v. Kriton*, 112 Tex. 532, 249 S.W. 193 (1923) ("[T]he words 'ascertaining the sum payable' have reference to the sum or amount the party executing the obligation may be reasonably expected or required to pay, in view of all the circumstances incident to the matter or business he is contracting about, if by reason of the provision of the contract he becomes at any time liable to pay thereunder....").

116. Prejudgment interest should not be awarded when defendant has no means available to determine that amount which he had to tender in order to prevent interest from accruing.

117. Under Count I, plaintiffs' damages are ascertainable from the face of the contract and resort to the well-established list prices of sugar and HFCS-55. Although plaintiffs urged the Court to use an alleged "market price" of HFCS to determine damages, defendant has always maintained that, if the Company is liable for damages under Count I, such damages should be calculated by subtracting the list price of HFCS from the list price of sugar.

118. The list price of sugar is well-established as the price upon which defendant has based the syrup price charged plaintiffs. Defendant has contended in this litigation, and the Court has found, that the list price of HFCS is a recognized, well-established market price. *See* Defendant's Proposed Findings of Fact and Conclusions of Law ¶¶ 271-289 at 57-60 (Dkt. 896); *see supra*.

119. The fact that the Company contested liability does not preclude an award of prejudgment interest. *E.g., United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480,709 P.2d

649 (1985) (quoting *State Trust & Sav. Bank. v. Hermosa Land & Cattle Co.*, 30 N.M. 566, 597, 240 P. 469, 481 (1925) (quoting *Laycock v. Parker*, 103 Wis. 161, 79 N.W. 327 (1899))) ("[Mere] difference of opinion as to amount is ... no more reason to excuse [defendant] from interest than difference of opinion whether he legally ought to pay at all....").

120. The Court finds plaintiffs have been deprived the use of the money used to pay the Company's overcharge.

121. The Court therefore concludes that defendants are liable for prejudgment interest on the damages owed under Count I to plaintiffs from the twelve jurisdictions which require that claims be liquidated or determinable before prejudgment interest may be awarded. The Court also concludes that the plaintiffs from California and Kentucky are entitled to prejudgment interest because their claims were sufficiently determinable under California Civil Code § 3287(a) and *General Accident Fire & Life Assurance Corp. v. Judd*, 400 S.W.2d 685 (Ky.1966) (prejudgment interest awarded on liquidated claims as a matter of right). In the alternative, the Court exercises its discretion and awards prejudgment interest to the plaintiffs from California and Kentucky under California Civil Code § 3287(b) and *General Accident Fire & Life Assurance Corp. v. Judd*, 400 S.W.2d 685 (Ky.1966) (prejudgment interest awarded on unliquidated claims as a matter of discretion). The Court also exercises its discretion and awards prejudgment interest to the plaintiffs from Mississippi, New Mexico, and Virginia.

122. Plaintiffs in their post-trial briefing request that the Court award attorneys' fees. Plaintiffs did not preserve in the Consolidated Pretrial Order a claim for attorneys' fees under Count I.

123. Further, pursuant to the "American Rule," attorneys' fees are not recoverable by a prevailing party in federal court absent a governing statute or enforceable contract so providing or unless the opposing party acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *In re Perry*, 882 F.2d 534, 538 (1st Cir.1989); *Sea-Land Service, Inc. v. Murrey & Son's Co., Inc.*, 824 F.2d 740, 744 (9th Cir.1987); *Ford v. Temple Hospital*, 790 F.2d 342, 346 (3d Cir.1986); *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299, 305 (3d Cir.1982); *Rollison v. Biggs*, 567 F.Supp. 964, 967-68 (D.Del.1983), *aff'd* 749 F.2d 27 (3d Cir.1984).

124. There is no governing statute or enforceable contract providing for the recovery of attorneys' fees in this case. In addition, the Court finds that, while defendant engaged in hard-nosed litigation and business decisions, the Company has not acted in bad faith, vexatiously, wantonly, or with oppressive purpose.

125. Consequently, the Court concludes plaintiffs are not entitled to attorneys' fees under Count I.

126. The parties will be ordered to resubmit their damage figures calculated in accordance with this Opinion.

COUNT II

FINDINGS OF FACT

A. *Introduction.*

1. Count II finds its genesis in the Company's response to the rulings of Judge Schwartz in this litigation. Judge Schwartz' various holdings are second nature to the litigants and others familiar with this case; however, the Court will briefly review the events which led plaintiffs to file a supplemental complaint containing the allegations in Count II.

2. In *Coke II*, Judge Schwartz certified for class action treatment two issues in the litigation—the meaning of "sugar" as that term is used in paragraph 10 of the Consent Decrees and the meaning of "market price" of sugar as that term is used in paragraph 7 of the Consent Decrees—and severed those issues for separate trial pursuant to Fed.R.Civ.P. 42(b). *See* Dkt. 155 & 157. The two issues were tried to Judge Schwartz between May 19—June 13, 1986, and resulted in Judge Schwartz' opinion in *Coke III*, decided August 8, 1986.

3. As previously stated, in *Coke III* Judge Schwartz defined "sugar" for purposes of paragraph 10 as "granulated sugar from cane or beet." *Coke III* at 1391. Judge Schwartz also decided that HFCS-55 is not sugar as that term is used in paragraph 10. *Id.*

4. In *Coke IV*, decided February 18, 1987, Judge Schwartz denied the Company's motion to amend the decision in *Coke III*. He also denied plaintiffs' motion that the decision in *Coke III* be certified as a final judgment which could be appealed immediately.

5. Prior to the denial of the motion to amend the *Coke III* rulings, the Company informed the unamended bottlers that as of May 1, 1987 the opportunity to sign the 1978 and 1983 Bottlers' Contract Amendments would be withdrawn.

6. On March 16, 1987, in reaction to Judge Schwartz' decisions in *Coke III* and *Coke IV*, the Company sent the following letter, which for purposes of this litigation is known as the "Sucrose Letter," to plaintiffs:

> On August 8, 1986, Judge Murray M. Schwartz issued an opinion and order in the case of Coca-*Cola Bottling Company of Elizabethtown, Inc., et al. v.*

The Coca-Cola Company, 654 F.Supp. 1388 (1986), Civil Action No. 81-48-MMS, United States District Court for the District of Delaware.

Judge Schwartz's opinion and order dealt with two issues. One of these was the meaning of the word "sugar," as used in paragraph 10 of the 1921 Consent Decrees entered into between the Company and the parent bottlers. Judge Schwartz held that for the purposes of paragraph 10 of the Consent Decrees, sugar meant refined granulated sugar from cane or beet, i.e., sucrose, and accordingly that HFCS-55 was not sugar within the meaning of paragraph 10 of the Decrees.

The Company thereafter filed a motion to alter or amend the Court's opinion in certain respects. This motion was decided by Judge Schwartz on February 18, 1987. He adhered to his ruling that "sugar" as used in paragraph 10 of the Consent Decrees did not include HFCS-55.

The Company respectfully disagrees with Judge Schwartz' interpretation of the word "sugar" in the Consent Decrees and, if necessary, will appeal the ruling at an appropriate time. Nonetheless, the Company will begin to furnish to you Coca-Cola Bottle Syrup that is sweetened with sucrose.

Accordingly, I am writing to inform you that effective as of September 1, 1987, the Company will supply to your and your authorized processor Coca-Cola Bottle Syrup that is sweetened 100% with sucrose. Thereafter, only Bottle Syrup sweetened with sucrose should be used in the production and sale of Coca-Cola in bottles and cans in

your territory, unless you agree with the Company in writing on or before July 1, 1987 that you will accept HFCS-55 as "sugar" under the terms of your bottle contract and the Consent Decrees and that Bottle Syrup sweetened with HFCS-55 may be priced by the Company on the same terms as Bottle Syrup sweetened with sucrose.

Similarly, effective as of September 1, 1987, the syrups supplied to you or your authorized processor by the Company for the production of Coca-Cola classic, caffeine-free Coca-Cola, and cherry Coke, will be sweetened 100% with sucrose unless you agree with the Company in writing on or before July 1, 1987 that you will accept HFCS-55 as "sugar" and that syrups sweetened with HFCS-55 may be priced by the Company on the same terms as syrups sweetened with sucrose.

7. Plaintiffs responded to the Sucrose Letter by filing a Motion for Preliminary Injunction (Dkt. 563) to prevent the Company from carrying out its intentions. The Company agreed to postpone implementing the Sucrose Letter policy, and plaintiffs agreed to waive damages pending disposition of the motion.

8. In *Coke V*, decided September 1, 1987, Judge Schwartz denied plaintiffs' preliminary injunction motion.

9. On December 1, 1987, the Company began to supply all unamended bottlers and their authorized processors with sucrose-sweetened syrups for Coca-Cola, Coca-Cola classic, caffeine-free Coke, and cherry Coke.

10. In *Coke V*, Judge Schwartz allowed plaintiffs to supplement their complaint to include allegations concerning

the Company's implementation of the Sucrose Letter policy. These allegations form the substance of Count II of this litigation, which seeks an injunction prohibiting the Company from supplying plaintiffs with sugar-sweetened syrup while providing HFCS-sweetened syrup to the amended bottlers and damages for breach of the duty of good faith and fair dealing implied in the unamended bottle contracts. The Court in the following sections will also address plaintiffs' request under Count I that the Court rewrite their unamended contracts to provide for use of and pass through of savings from sweeteners other than granulated sugar from cane or beet in the syrup supplied by the Company and their assertion that the unamended contracts entitle them to receive concentrate in lieu of syrup.

B. *Contentions of the Parties*

11. Plaintiffs assert that, by supplying them with syrup sweetened with 5.32 pounds of sugar per gallon and no HFCS-55, the Company has breached paragraph FIRST of the unamended contracts as it incorporates paragraph 10 of the Consent Decrees because the Company is not supplying them with "high grade standard Bottlers Coca-Cola Syrup [which] ... contain[s] not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup."

12. Plaintiffs contend that the modifier "standard" as used in paragraph 10 of the Consent Decrees requires the Company to provide a "uniform" syrup to all bottlers—both amenders and unamenders. Because the bottlers who signed the 1978 Amendment receive syrup sweetened with HFCS-55, plaintiffs argue that HFCS-sweetened syrup has become the "standard" syrup for bottled Coca-Cola to be received by plaintiffs pursuant to the unamended contracts. In other words, plaintiffs contend that the sucrose sweetened syrup

which they currently receive, even though it is sweetened with 5.32 pounds of sugar per gallon, does not conform to paragraph FIRST of their unamended contracts as it incorporates paragraph 10 of the Consent Decrees because it is not "high grade *standard* Bottlers Coca-Cola Syrup."

13. In addition, plaintiffs assert the Company breached its duty of good faith and fair dealing implied in the unamended contracts when it began supplying them with sucrose-sweetened syrup and when it instituted certain quality control procedures at bottling facilities which handle both sucrose- sweetened and HFCS-sweetened syrups.

14. Plaintiffs allege that the Company's actions have harmed them in a number of ways, including:

a. Those plaintiffs who package product for other bottlers incurred increased operating expenses in connection with implementing the quality control procedures and maintaining dual inventories. Tr. 888-90, 894-95, 962-84 (W. Schmidt); Tr. 2075-79 (Wilson); Tr. 3746-54 (Trombley); Tr. 4300-06 (Hanlon).

b. Some plaintiffs who receive packaged product from amended processors or co- ops were forced to find alternative processors when the amended processor or co-op refused to package sucrose sweetened syrup. Tr. 1365 (C. Schmidt); Tr. 1902-03, 1908 (Williams); Tr. 2046, 2052-53, 2062-69 (Wilson); Tr. 2899-902, 2905-08 (Mayo); Tr. 3385-95, 3377-83, 3392-93 (Herauf); Tr. 3441-43 (Christian); Tr. 3717-18, 3721-23, 3727-29, 3741-46 (Trombley); Tr. 3083-85 (Bernabucci).

c. Other plaintiffs who receive packaged product from amenders or co-ops were forced to pay a substantial upcharge per case of product, Tr. 3091-92, 3987-88 (Bernabucci); Tr. 4211-12, 4217, 4265-77 (Payne); Tr. 4284-85,

4287-95 (Hanlon); Tr. 2864-65 (Tyndall) Tr. 2905 (Mayo), or to invest in packaging equipment to process the syrup themselves. Tr. 3437, 3446-49 (Christian); 3641-42, 3655-79, 3681-87, 3694-98 (Manke); Tr. 3727-28 (Trombley).

d. The Company declined to continue its voluntary participation in cooperative advertising and merchandising programs with the unamended bottlers while continuing to provide amended bottlers with supplemental marketing funds.

e. The Company withdrew the 1978 and 1983 Amendments and introduced an allegedly more onerous Master Bottle Contract.

15. Plaintiffs contend the Company instituted the dual syrup system only after assuring itself that the amended bottlers would suffer no substantial disruption in their operations as a result. They allege the Company breached its duty of good faith and fair dealing implied in the unamended bottle contracts by instituting the dual syrup system in bad faith and with the sole intent of "punishing" plaintiffs for failing to sign the 1978 Amendment and for instituting this litigation.

16. Plaintiffs also allege that the implementation of the dual syrup system and termination of cooperative advertising and merchandising programs with the unamenders breaches the Company's duty under paragraph 1 of the Consent Decrees to exercise its best efforts to promote Coca-Cola:

> It being recognized that the primary obligation of all parties hereto, as well as other individuals and Bottling Companies who employ the name Coca-Cola, in their corporate or trade name, is to promote the sale of Coca-Cola....

17. In support of their position, plaintiffs allege that the Company's prior course of performance included a policy of

actively aiding the bottlers in becoming low cost producers. As proof of the policy, plaintiffs point to various statements by Company officials to the effect that it is in the interest of the Company and the bottling network that the bottlers' costs remain low. *E.g.*, Tr. 4796-97 (Dyson); Tr. 2335-36 (Wallace); Tr. 4972-73 (Keough); Tr. 7741, 7744 (Mellett); Tr. 8117 (Wallace); Tr. 9012 (Blanchard); Tr. 5106-08 (Evans); Tr. 2386-87 (Burns); *see generally*, Plaintiffs' Proposed Findings of Fact and Conclusions of Law ¶¶ 352-357 at 87- 90 (Dkt. 897).

18. As previously stated, plaintiffs in addition assert that their unamended contracts entitle them to receive concentrate in lieu of syrup. They also request that the Court provide declaratory and injunctive relief by "interpreting" their unamended contracts to provide for the use of sweeteners other than sugar and for the pass through to them of any savings derived from the use of cheaper substitute sweeteners.

19. The Company contends that plaintiffs are estopped from asserting that the provision to them of sucrose-sweetened syrup violates their unamended contracts because of plaintiffs' prior assertions that they were entitled to and preferred to receive syrup sweetened 100% with sucrose.

20. The Company also asserts that since late 1987 plaintiffs have received exactly the syrup for which they contracted, that is, syrup sweetened with 5.32 pounds of sugar per gallon. The Company contends that the modifier "standard" refers to the strength or quality of the syrup.

21. In addition, the Company contends that, in the aftermath of Judge Schwartz' decisions in *Coke III* and *Coke IV*, it was faced with a number of alternative courses of action. The Company contends that its election to provide plaintiffs the option of receiving only sucrose-sweetened syrup, amending their contracts, or agreeing to continue to receive HFCS-

sweetened syrup at a sugar-based price and waiving damages was a business decision. The Company asserts it had legitimate business reasons for its action, including its desire to limit its exposure to damages under Count I, to remove plaintiffs' incentive for further litigation, to preserve its litigation posture, and to treat fairly the amended bottlers. The Company asserts that any harm incurred by plaintiffs is a result of their own choice to receive sucrose-sweetened syrup over the alternatives offered by the Company.

C. *Plaintiffs' Expressed Preference for Syrup Sweetened with 100% Sucrose*

22. Paragraph 10 of the Consent Decrees states that the syrup to be provided the bottlers by the Company will be "high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty-two one- hundredths (5.32) pounds of sugar to each gallon of syrup."

23. From the filing of the original complaint in this action in 1981 until the filing of the motion for preliminary injunction, plaintiffs uniformly expressed a preference for receiving syrup sweetened with 100% sucrose. The following are examples of statements made by various plaintiffs during the first six and one-half years of this litigation.

24. In paragraph 45 of the original complaint (Dkt. 1), plaintiffs alleged:

> The ... Unamended Bottlers have notified The Coca-Cola Company that the substitution of HFCS-55 for part of the sugar in the formula for the manufacture of Coca-Cola Bottlers' Syrup, without the consent of the individual contracting bottlers, constitutes violations of both the 1921 [Consent Decrees] and of their first-line bottlers' contracts,

> *and has demanded that The Coca-Cola Company supply the ... Unamended Bottlers Coca-Cola Bottlers' Syrup containing with not less than the 5.32 pounds of granulated sugar required in paragraph 10 of the [Consent Decrees], and not syrup made with HFCS 55,* or, alternatively, that The Coca-Cola Company refund and pass on to the Unamended Bottlers the savings achieved by The Coca-Cola Company from the substitution of HFCS 55 for 50% of the sugar in the syrup.

(emphasis added).

25. In 1980, shortly after the Company announced its plan to sweeten the syrup with a blend of sucrose and HFCS-55, lead plaintiff William B. Schmidt, the Elizabethtown bottler, and other plaintiffs wrote to the Company expressing a preference for sucrose-sweetened syrup. Tr. at 1547 (W. Schmidt). Schmidt testified in a deposition taken in September 1981 that he would be satisfied if the Company provided him with bottle syrup sweetened with 100% sucrose. Tr. at 1564 (W. Schmidt). He reiterated in June 1987 that he would have been satisfied in February 1981 (when the complaint was filed) if the Company had agreed to provide him with sucrose-sweetened syrup after he wrote the Company in March 1980. Tr. at 1547 & 1549-50 (W. Schmidt).

26. In a letter dated March 18, 1982, from lead plaintiff William B. Schmidt to J.A. Blanchard, Vice President, Coca-Cola USA, Schmidt stated: "We [the plaintiffs] prefer to receive 100 percent sucrose Coca-Cola syrup...." DX745.

27. In a letter dated August 16, 1986, from William B. Schmidt to the other bottlers, Schmidt stated that the unamended bottlers' contention in the litigation as of the bench trial in *Coke III* was "that Paragraph 10 of the 1921

Consent Decrees required The Coca-Cola Company to use sugar in the manufacture of Bottlers Syrup...." DX748 at 2. In the same letter, Schmidt interpreted Judge Schwartz' ruling in *Coke III* as meaning "at the absolute minimum, that the Unamended Bottlers are entitled to an injunction prohibiting The Coca-Cola Company from supplying them with Coca-Cola syrup containing HFCS- 55 in the future." DX748 at 3.

28. Oliver Hutaff, the Wilmington, North Carolina bottler, contended in a 1981 deposition that the Company was obligated to provide sucrose-sweetened syrup. Tr. 2766-68 (Hutaff).

29. In a June 1987 deposition, the Plymouth bottler testified: "I believe that the Coca-Cola Company is supposed to supply all the bottlers by the terms of their unamended contracts syrup sweetened with sucrose." Tr. at 2965-66 (Mayo).

30. In a March 24, 1987 deposition, the Laredo bottler contended that syrups sweetened with sucrose were Coca-Cola Bottlers' Syrup under his unamended contract, but the same syrups sweetened with HFCS-55 did not comply with the terms of his contract. Tr. at 4267-72 (Payne).

31. As late as a December 1987 deposition, the Jamestown bottler testified:

> QUESTION: Do you have an opinion or a contention as to what you believe standard Coca-Cola bottlers' syrup is?
>
> ANSWER: Without the mutual revision of our contract—of our franchise contract, my definition of standard bottlers' Coca-Cola syrup would be what the contract defines it to be.

QUESTION: And what is that? ANSWER: Coca-Cola bottlers' syrup manufactured with no less than 5.32 pounds of standard granulated sugar per gallon.

Tr. at 3861 (Bernabucci).

32. Plaintiffs now argue that the litigation was always about the price of the syrup and not its ingredients.

33. Plaintiffs argue their legal position has always been that the Company could provide them with syrup sweetened with HFCS so long as it obtained their consent and passed through to them any resulting savings in product cost. For example, the prayer for relief in the original complaint requested:

(a) That the Court enter a declaratory judgment under 28 U.S.C. §§ 2201 and 2202 determining that:

(1) The Coca-Cola Company is obligated under the terms of paragraph 10 of the 1921 Final Decrees entered by the United States District Court for the District of Delaware and under the terms of the first-line bottlers' contracts to supply the plaintiff and members of the class of Unamended Bottlers "high grade standard Bottlers Coca-Cola Syrup that shall contain not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup."

(2) The substitution by The Coca-Cola Company of HFCS 55 for the sugar formerly used to manufacture Coca-Cola bottlers' Syrup sold to plaintiff and members of the plaintiff class, *without their consent*, constitutes a material breach of (A) the 1921 Final

Decrees, and (B) the plaintiff's and each class member's first-line bottler's contract.

(b) That the court enter a preliminary and a permanent injunction restraining and enjoining The Coca-Cola Company from violating the provisions of paragraph 10 of the 1921 Final Decrees, and the first-line bottlers' contracts of the plaintiff and members of the plaintiff class, by failing or refusing to supply plaintiff and members of the class their requirements of "high grade standard Coca-Cola Bottlers Syrup that shall contain not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup," *so long as (1) The Coca-Cola Company continues to charge the plaintiff and other Unamended Bottlers for syrup based on the list price of sugar, and (2) refuses to pass on to the plaintiff and the Unamended Bottlers the full amount of any savings achieved by The Coca-Cola Company from the use of a sugar substitute, including but not limited to HFCS 55.*

(emphasis added).

34. Further, in *Coke III*, Judge Schwartz reiterated his understanding of plaintiffs' legal position as follows:

> Plaintiffs assert the term "sugar" as used in the Decrees means refined granulated sugar, i.e., sucrose. They contend that HFCS-55 is not "sugar" as that term is used in the 1921 Consent Decrees and that the Company is violating Paragraph 10 of those Decrees by using HFCS-55 in Coca-Cola Bottlers Syrup *without their consent*.

Coke III at 1390 (emphasis added).

35. Judge Schwartz stated in the related *diet Coke* litigation: "The Court finds it difficult to believe that the plaintiffs

would have filed the Coke lawsuit if the Company had passed through the savings from using HFCS to unamended bottlers as well as amenders." *diet Coke V* at 16.

36. Nevertheless, statements by various plaintiffs, including those quoted above, demonstrate unequivocally that, while plaintiffs were willing to settle for a pass through of the HFCS savings, their position was that the contract required and they preferred to receive syrup sweetened with 100% sucrose. *Coke V* at 917 ("The unamended bottlers' original complaint in this action signalled their clear objection to the use of HFCS-55 as a substitute for sugar.... While plaintiffs may file an amended and supplemental complaint which omits any claim to receive sucrose syrup, they cannot now assert they willingly accepted HFCS-55 syrup and never truly objected to the Company's action.").

D. *The Meaning of the Modifier "Standard" as it Describes Bottlers Coca-Cola Syrup for Purposes of the Unamended Bottle Contracts*

37. Under paragraph FIRST of the unamended bottling contracts, the parent bottlers were obligated to supply each actual bottler with "sufficient syrup for bottling purposes to meet the requirements" of that bottler's territory. The unamended contracts do not define the term "syrup for bottling purposes."

38. As stated under Count I, the actual bottlers contracted to receive the same syrup the parent bottlers received from the Company, and paragraph FIRST of the unamended contracts incorporates the description of the syrup in paragraph 10 of the Consent Decrees. *See supra* Count I PP 16 & 62.

39. Paragraph 10 of the Consent Decrees describes the syrup the Company was required to supply the parent

bottlers. It states that the syrup provided to the parent bottlers by the Company would be "high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty-two one-hundredths (5.32 pounds) of sugar to each gallon of syrup." Paragraph 10 contains the only description of syrup for bottling purposes in either the Consent Decrees or the bottle contracts.

40. The phrase "standard Bottlers Coca-Cola Syrup" cannot be read in isolation, but instead must be interpreted in the context of paragraph 10 and of the Consent Decrees as a whole. Paragraph 10's description of Bottlers Coca-Cola Syrup contains three modifying terms: "standard"; "high grade"; and "shall contain not less than five and thirty-two one-hundredths (5.32 pounds) of sugar to each gallon of syrup." The modifiers "high grade" and "shall contain ..." describe the strength and quality of the syrup. Thus, it seems likely that the modifier "standard" also describes strength and quality.

41. The parties' usage of the term "standard" in writings contemporaneous with the Consent Decrees indicates that the term refers to quality and not to uniformity. *E.g.*, PX287 ("[D]uring these three months last year you supplied our bottlers with syrup made out of invert sugar, and the quality of Coca-Cola was not up to the *standard*") (emphasis added); PX1 at 1501 ("During the 1921 litigation an attorney for the Company wrote to a Parent bottler, 'it is absolutely necessary to keep our product up to a certain *standard* ' ") (emphasis added).

42. The parties also used the term "standard" in Paragraph 7 of the Consent Decrees (the pricing provision) to modify "granulated sugar." In that context "standard" means a *type* or *grade* of sugar rather than uniformity. *See also Coke III* at 1413 n. 31.

43. Events prior to the entry of the Consent Decrees in 1921 indicate that the parties were concerned about maintaining the quality of the syrup. Prior to the entry of the Consent Decrees, the Company had on occasion decreased the strength of the sweetener in the syrup. Between 1907 and 1921, the Company reduced the quantity of sugar in a gallon of Coca-Cola Bottler's Syrup from 6.3 pounds before World War I, PX766 at AZ0690, to 5.97 pounds during 1916-1918, PX220, and to 5.32 pounds by the time of the 1920 litigation. In 1899, an ounce of syrup would produce nine ounces of Coca-Cola; by 1916, an ounce of syrup would produce only six and one-half ounces of Coca-Cola. *Coke III* at 1402 n. 14. Therefore, the reduction in the quantity of sweetener in a gallon syrup reduced the strength of the syrup and had the effect of increasing the price of the syrup paid by the actual bottlers, who could produce fewer six and one-half ounce bottles of Coca-Cola from a gallon of syrup.

44. Course of performance evidence also indicates that "standard" describes syrup quality and not uniformity. There have been and continue to be lapses in uniformity of sweetener even when all bottlers were theoretically receiving the same syrup. For instance, prior to the entry of the Consent Decrees, the parent bottlers began adding a "simple syrup" to the syrup received from the Company in order to eliminate the difference in taste between the bottled product and the fountain product. Admitted Facts, IV.A. ¶ 13 at 164. The parties have stipulated that it is probable that this simple syrup was not uniform. Admitted Facts, III.C. ¶ 118 at 67; III.D., ¶ 283 at 152; IV.A. ¶ 15 at 164.

45. During the Company's conversion from sugar to HFCS in the syrup which was at that time supplied all bottlers, including plaintiffs, various bottlers received syrup

sweetened with different combinations of sucrose and HFCS. Tr. at 8255-56 (Cunningham).

46. There is no uniform sweetening system even among the bottlers who signed the 1978 Amendment. Approximately 90% of all bottlers purchase concentrate rather than syrup. Tr. at 7672 (Mellett). Concentrate contains no sweetener, and the amended bottlers who use concentrate are authorized by the Company to use any of five sweetener combinations:

0% HFCS	-	100% Sucrose
25% HFCS	-	75% Sucrose
50% HFCS	-	50% Sucrose
75% HFCS	-	25% Sucrose
100% HFCS	-	0% Sucrose

Tr. at 7674 (Mellett); Tr. at 8253; 8340 (Cunningham); DX1157; DX1209.

47. The syrup sold in Hawaii continues to be sweetened with 100% sucrose. Some of the syrup sold during certain religious holidays is kosher and sweetened with 100% sucrose. Tr. 8256-58 (Cunningham).

48. Moreover, the amended bottlers operate under a contract different from plaintiffs' unamended contracts. The amenders' contract expressly permits the Company to provide syrup sweetened with ingredients, such as HFCS-55, which are not included in the term "sugar" as that term has been defined for purposes of the Consent Decrees.

49. At the time the Company and the parent bottlers entered into the Consent Decrees, the Thomas bottlers operated under two-year bottling contracts, whereas the contracts

of the Whitehead-Lupton bottlers were perpetual. Admitted Facts III.D. ¶ 279 at 151; III.A. ¶ 100 at 51; *Coke VI* at 90. Consequently, the parties were aware at the time the Consent Decrees were entered into that the actual bottlers could and did operate under different bottling contracts. No provision in the Consent Decrees mandates that the actual bottlers' contracts be uniform. There is no clause in plaintiffs' unamended contracts which prohibits the Company from entering into different contracts with other bottlers outside plaintiffs' exclusive bottling territories. It seems reasonable, therefore, to infer that the parties to the 1921 Consent Decrees and the unamended contracts did not intend to prohibit the Company from supplying a different syrup to different bottlers under a different contract, so long as the syrup provided was of standard, high grade quality.

50. "[H]igh grade standard Bottlers Coca-Cola Syrup" therefore describes a syrup of a specific quality and strength. There is no evidence in the record that the 100% sucrose-sweetened syrup currently being received by plaintiffs is of a lesser quality than the "high grade standard Bottlers Coca-Cola Syrup [which] contain[s] not less than five and thirty-two one-hundredths (5.32 pounds) of sugar to each gallon of syrup" for which their contracts provide.

E. *The Parties to the Consent Decrees Intended That Sugar be Used as the Exclusive Sweetening Ingredient in the Syrup.*

51. Prior to the imposition of sugar quotas and price controls in 1917, cane sugar was the primary sweetener used in soft drinks. Admitted Facts III.C. ¶ 122 at 68. Sucrose, especially sucrose from cane, was the preferred sweetener in the soft drink bottling industry. Admitted Facts III.C. ¶ 123 at 68.

52. The parties to the Consent Decrees were familiar with the use of cheaper substitute sweeteners and variations

in sweetener strength. The fact that they could, but did not, provide in the Consent Decrees and the unamended contracts for the use of sweeteners other than sugar indicates that they did not intend that the syrup be sweetened with an ingredient other than sugar.

53. Prior to the entry of the Consent Decrees, the Company had on occasion decreased the strength of the sweetener in the syrup. Between 1907 and 1921, the Company reduced the quantity of sugar in a gallon of Coca-Cola Bottler's Syrup from 6.3 pounds before World War I, PX766 at AZ0609, to 5.97 pounds during 1916-1918, PX220, and to 5.32 pounds by the time of the 1920 litigation. In 1899, an ounce of syrup would produce nine ounces of Coca-Cola; by 1916, an ounce of syrup would produce only six and one-half ounces of Coca-Cola. *Coke III* at 1402 n. 14. Therefore, the reduction in the quantity of sweetener in a gallon syrup reduced the strength of the syrup and had the effect of increasing the price of the syrup paid by the actual bottlers, who could produce fewer six and one-half ounce bottles of Coca-Cola from a gallon of syrup.

54. During 1918, the Company used a number of cheaper sweeteners as substitutes for cane sugar in Coca-Cola bottlers' syrup. The Company used corn syrup, glucose, beet sugar, and invert sugar as substitutes for cane sugar in Coca-Cola Bottler's Syrup. Admitted Facts III.A. ¶ 52 at 32-33. Substitute sweeteners used by the Company during the World War I period proved unsatisfactory. PX189; PX287; PX708.

55. The parties' familiarity with substitute sweeteners at the time of the 1920 litigation is further evidenced by the distribution by the USDA of a pamphlet entitled "Formulas for Sugar Saving Sirups." PX152. Copies of this pamphlet as published by USDA were widely publicized and reprinted by the

Georgia Department of Agriculture, PX144; PX232, in trade journals directed at bottlers, including the *National Bottlers' Gazette*, PX172; PX208, and *The American Bottler*, PX147, as well as by suppliers to the soft drink industry, PX190.

56. Many Coca-Cola bottlers purchased concentrates from other manufacturers to bottle beverages other than Coca-Cola, such as ginger ale or various fruit- flavored drinks. Admitted Facts, III.C. ¶ 125 at 69. These bottlers would add sweetener to the concentrate. Many Coca-Cola bottlers who faced a curtailment of the bottling of ginger ale and fruit-flavored drinks from concentrates as a result of sugar shortages due to World War I, Admitted Facts, III.A. ¶ 48 at 31, requested copies of "Formulas for Sugar Saving Sirups" directly from the USDA. *E.g.*, PX179; PX182-184; PX186; PX188; PX195; PX197-200; PX210; PX213-218; PX220; PX223-224; PX226; PX234; PX243; PX247-248; PX254; PX256; PX265. These bottlers included the Birmingham Coca-Cola Bottling Company, whose President was Chairman of the Special Committee of the Coca-Cola Bottlers' Association and an intervenor in the 1920 litigation. PX185; PX198.

57. In 1922, one Coca-Cola bottler wrote that he was familiar with the USDA's "Formula for Sugar Saving Sirups" and that, in his opinion, substitute sweeteners were inadequate replacements for sugar. PX708; Admitted Facts III.A. ¶ 131 at 70-71.

58. Although the parties to the Consent Decrees were familiar with substitute sweeteners, the only description of syrup for bottling purposes states that the syrup "shall contain not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup." Although the parties could have provided for the use of a substitute sweetener, there is no mention of or provision for the use of a sweetener other than sugar.

59. The parties' familiarity with substitute sweeteners in 1921 and their dissatisfaction with the effect of substitute sweeteners on the quality of the syrup, combined with their failure to provide for the use of sweeteners other than sugar in the Consent Decrees and unamended bottle contracts, is evidence that the parties intended that 5.32 pounds of sugar be used as the exclusive sweetener for Bottlers Coca-Cola Syrup.

60. The pricing provisions of the Consent Decrees and the unamended contracts also provide evidence that 5.32 pounds of sugar was the only sweetener intended by the parties. As previously stated, the pricing mechanism in the Consent Decrees and unamended contracts is inextricably linked to the description of"Bottlers Coca-Cola Syrup" in paragraph 10 of the Consent Decrees, including the description that "Bottlers Coca-Cola Syrup" "shall contain not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup." *See supra* Count I at ¶ 97.

61. The base price of $1.175 per gallon paid by the parent bottlers under paragraph 5 of the Consent Decrees was calculated on the cost of 5.32 pounds of sugar per gallon. PX1 (R. 1605-06); PX557 ("[T]he future price shall be on a sliding scale of the price of sugar alone figured upon the basis of 5.32 pounds of standard granulated sugar to the gallon of syrup....").

62. The pricing mechanism provides for a base price of one dollar and thirty cents ($1.30) per gallon plus an extra six cents (6¢) per gallon for every one cent (1¢) increase in the price of sugar over seven cents (7¢) per pound. The requirement in paragraph 10 that the syrup contain not less than 5.32 pounds of sugar per gallon served a price-protecting function by ensuring the Company could not evade the pricing provisions of the Consent Decrees by reducing the

amount of sugar used or using cheaper substitute sweeteners. *See Coke III* at 1402.

F. *There has been no Mutual Agreement to Amend the Consent Decrees or Unamended Contracts to Provide for the Use of a Sweetener Other Than Sugar.*

63. The Company's unilateral substitution of HFCS-55 for sugar in the syrup may be construed as an offer on the part of the Company to amend the Consent Decrees and/or the unamended contracts to provide for the use of HFCS-55 instead of sugar as the sweetening ingredient in the syrup. This offer may be construed as an offer to substitute HFCS-55 for sugar as an ingredient while continuing to price the syrup according to the sugar-based pricing mechanism of paragraphs 6 and 7 of the Consent Decrees. The plaintiffs did not accept the Company's offer.

64. Almost from the instant in which the Company first announced its intention to substitute HFCS for sugar in the syrup in 1980 until the filing of the motion for preliminary injunction in 1987, plaintiffs have objected to the Company's course of action. Plaintiffs have both expressed a preference for receiving syrup sweetened with 100% sucrose and insisted that if the Company provided them with HFCS-sweetened syrup that it should not charge them a sugar-based price. *See supra.*

65. The plaintiffs' request to receive HFCS-sweetened syrup on the pricing terms of their own choosing is not comparable to their prior acquiescence to the use of beet sugar in the syrup and therefore did not result in amendment of the unamended contracts to the extent they incorporate paragraph 10 of the Consent Decrees.

66. In 1947, after quality problems with beet sugar were solved, the Company began to use beet sugar in the syrup

sold to the bottlers. The Company subsequently purchased one-third of its sugar requirements from beet processors. The price differential between beet and cane sugar was eliminated in 1967. The bottlers knew of the Company's use of beet sugar for many years and continued to purchase syrup sweetened with beet sugar without objection. Their failure to object resulted in a waiver of their right to object to the use of beet sugar as outside their contracts. *See Coke III* at 1403.

67. The implied consent to beet sugar, however, did not leave the Company free to use any sweetener in the syrup without the consent of the bottlers. *Id.* These bottlers have clearly withheld their consent to the substitution HFCS-55 for sugar as the sweetening ingredient in the Bottlers Syrup absent a corresponding substitution of the price of HFCS-55 for the price of sugar in the pricing mechanism.

68. The position taken by plaintiffs—that they should receive the pass through of any of the savings resulting from the use in the syrup of HFCS-55 instead of sugar—may be construed as a counteroffer to amend the Consent Decrees and unamended contracts to provide for the use of different sweeteners at a syrup price based upon the price of the sweetener actually used. Throughout its defense of this lawsuit, the Company has rejected plaintiffs' counteroffer.

G. *The Interdependent Bottling Network and the Company's Institution of Quality Control Procedures*

69. Since its adoption of the 6 1/2 ounce Root Bottle as the standard Coca-Cola bottle in 1916, the Company has authorized over twenty package sizes for finished Coca-Cola. Tr. 5045-46 (Casey).

70. Since 1980, the number of non-diet products offered by the Company in the market has increased from one to

four (New Coke, Coke Classic, Cherry Coke, caffeine-free Coke).

71. This proliferation of products and packages has increased the bottlers' costs. Tr. 2057 (Wilson); Tr. 7825 (Mellett). The cost burdens fall especially on bottlers with smaller territories who cannot economically bottle syrup in the entire range of package sizes. Tr. 2499 (Hutaff).

72. One way in which the Company and the bottlers have addressed the increased costs associated with increased packaging has been by entering into Agency Processing Agreements, which allow the bottlers to have Coca-Cola products processed for them at manufacturing facilities located outside the bottler's exclusive territory. Admitted Facts, III.C. ¶ 191 at 86.

73. The parties to Agency Processing Agreements are the Company and the actual bottlers. Each Agency Processing Agreement expires by its own terms one year from the date on which it is entered and is terminable by either party without cause upon sixty days' notice. Admitted Facts, III.C. ¶ 192 at 86. In other words, the Company, if it chose, could terminate plaintiffs' Agency Processing Agreements and require bottlers to bottle the syrup themselves within their exclusive territories, on sixty days' notice. The Company could also choose not to renew plaintiffs' Agency Processing Agreements when they expire each year.

74. Plaintiffs first began entering into Agency Processing Agreements as early as 1965. Admitted Facts, III.C. ¶ 193 at 87.

75. In addition to enabling smaller bottlers to offer a wider range of packaged product, the Agency Processing Agreements presented larger bottlers an opportunity to

achieve economies of scale and lower their per unit costs by packaging product for other bottlers. For example, the Elizabethtown bottler installed the fourth privately owned can line in the country in 1963 to produce for itself and neighboring bottlers. Tr. 760-69; 798-99 (Schmidt). The bottlers also relied on the Agency Processing Agreements to acquire packaged product for their territories whenever exigent circumstances, such as fire, caused a temporary shortfall in production. *E.g.*, Tr. 3714-17 (Trombley).

76. In addition, Agency Processing Agreements enabled the bottlers to cooperate with each other and to build centralized production facilities ("co- ops") which achieve economies of scale by producing packaged product for a number of bottlers. *E.g.*, Tr. 2052 (Wilson) (Gulf States); Tr. 1891-92 (Williams) (Gulf States); Tr. 2524 (Hutaff) (South Atlantic Canners ("SAC")); Tr. 2893-95 (Mayo) (SAC); Tr. 3437-38 (Christian) (Mid-Atlantic Canners Assoc. ("MACA")); Tr. 4284-85 (Hanlon) (Great Lakes Canning; MACA).

77. Prior to December 1, 1987, amended and unamended bottlers received identical syrup and unamended bottlers could process for amended bottlers and vice-versa without changing their operational procedures or maintaining dual inventories. Tr. 795-96 (W. Schmidt); Tr. 7808-09 (Mellett); Tr. 8292-93 (Cunningham).

78. By 1987, approximately 21% of the entire non-diet beverage volume was processed under Agency Processing Agreements, and over 33% of plaintiffs' products were packaged by agency processors. *Coke V* at 911; Tr. 890-91 (W. Schmidt).

79. On November 5, 1987, Richard L. Burns, the Manager for Contractual Affairs of Coca-Cola USA, notified

the bottlers who held term processing appointments (*i.e.*, the bottlers who packaged syrup for other bottlers under Agency Processing Agreements) that the Company would begin providing the unamended bottlers with syrup sweetened exclusively with sucrose. Burns also notified the holders of term processing appointments who processed for both amended and unamended bottlers that the Company's Beverage Quality Assurance Department would develop and forward procedures for segregating HFCS-sweetened syrup from sucrose-sweetened syrup. The notice indicated that the Company would monitor implementation of the quality control procedures and that unauthorized deviations could result in revocation of their term processing appointments. PX1432.

80. The quality control procedures were forwarded to the bottlers on November 9, 1987. The procedures were directed primarily at bottlers who would be packaging both HFCS-sweetened syrup and sucrose-sweetened syrup and required these bottlers to:

> (1) place orders for sucrose-sweetened syrup at least five days in advance;
> (2) thoroughly rinse the syrup storage system (hose, pumps, lines and tanks) before unloading sucrose-sweetened syrup into a tank which previously contained HFCS-sweetened syrup (no rinse is required, however when HFCS- sweetened syrup is placed into tanks formerly containing sucrose-sweetened syrup);
> (3) thoroughly rinse the system's syrup lines, proportioning, cooling, carbonating, beverage lines and filler to remove all traces of HFCS-55 syrup when packaging sucrose-sweetened syrup after

using the same equipment to package HFCS-sweetened syrup (but not vice versa);
(4) keep finished products sweetened with HFCS and sucrose separate and designated by type; and
(5) maintain records of syrup batch codes, date of product, shipping date, package date, code and identity of recipient bottler.

See PX1436 & 1437. The Company asserts these procedures were developed to ensure that the sucrose-sweetened syrup supplied to plaintiffs did not contain traces of HFCS-55.

81. Plaintiffs label the Company's decision to supply them with only syrup sweetened exclusively with sucrose combined with the institution of quality control procedures the creation of a "dual syrup system."

82. It was the unamended bottlers who first suggested that the Company create a dual syrup system. In October of 1980, several unamenders, including the Wilmington and Elizabethtown bottlers who are plaintiffs in this case, met with Company officials. Another of the unamended bottlers, Asa Day, Jr., suggested implementing a dual syrup system whereby the unamenders would continue to receive syrup sweetened with sucrose. Tr. 1512-13 (W. Schmidt); Tr. 2633-35 (Hutaff); PX2724.

83. As previously noted, in the early 1980's, plaintiffs objected to the use of HFCS-55 and requested that they receive syrup sweetened exclusively with sucrose. *See supra*. Several bottlers admitted that the plaintiffs' initial demands for sucrose-sweetened syrup after the Company first announced the conversion to HFCS-55 would have resulted in the very dual system of which plaintiffs now complain. *E.g.*, Tr. 1508 (W. Schmidt).

84. The Company asserts it was faced with a number of alternative courses of action following Judge Schwartz' decisions in *Coke III* and *Coke IV*. It could continue to supply plaintiffs with HFCS-sweetened syrup and charge a sugar price. Alternatively, it could pass through the savings from use of HFCS to plaintiffs. It also had the option of acceding to plaintiffs' original requests by supplying them with syrup sweetened with sucrose, thus creating a dual syrup system. Tr. at 7598 (Mellett); Tr. at 8005-06 (Wallace). The Company elected to provide plaintiffs the option of receiving only sucrose- sweetened syrup, signing the Amendments or agreeing to receive HFCS-sweetened syrup at a sugar based price. *See* Sucrose Letter, *supra*.

85. The Company gave a number of reasons for the decision, including Company officials' judgment that continuing to supply plaintiffs with HFCS-sweetened syrup without passing through the savings might be construed as a violation of Judge Schwartz' decisions in *Coke III* and *Coke IV*, the Company's desire to limit its exposure to damages under Count I, and its desire to remove plaintiffs' incentive for further litigation. Tr. 7599 (Mellett); Tr. 8005-06, 8060, 8227 (Wallace). The Court finds the Company had legitimate, nonpretextual business reasons for its course of action.

86. The Company's witnesses also testified to a concern for the amended bottlers' perception that, by receiving a pass through, plaintiffs would obtain one of the benefits of the 1978 Amendment without undertaking any of its obligations. *E.g.*, Tr. 7599, 7601, 7851 (Mellett); Tr. at 8005-06, 8061 (Wallace).

87. The Court notes that providing plaintiffs with HFCS-sweetened syrup and passing through the savings would be contrary to the Company's position in this case and in the *diet Coke* litigation.

88. The quality control procedures essentially consist of a single thorough water rinse of the packaging equipment. Tr. 1759-65 (W. Schmidt).

89. The single rinse procedure is no different than the procedure utilized between packaging runs of any two different syrups, such as Coca-Cola and caffeine-free Coke or Coca-Cola and Sprite. *Id.*

90. If the Company truly intended to "punish" the plaintiffs, it could easily have devised significantly more onerous procedures. For instance, the Company could have required its three-step procedure, which involves a rinse, a cleaner and another rinse, *see* Tr. 8271 (Cunningham), or its five-step rinse procedure for cleaning the equipment between runs of a "non-pungent" product, such as Sprite, and a "pungent" product such as root beer. *Id.; see also* Tr. 1752, 1771 (W. Schmidt). The Company also could have required a rinse between runs of sucrose-sweetened syrup and HFCS-sweetened syrup.

91. Those bottlers that process both syrups could avoid performing the quality control procedures altogether by processing the sucrose-sweetened syrup in the first packaging runs of the day. Tr. 1756 (W. Schmidt).

92. The Company's asserted reason for the quality control procedures was to ensure the accuracy of the sweetener profiles it conducts as part of its product quality monitoring program.

93. As part of its regular quality control monitoring procedures, the Company conducts a "sweetener profile" on random samples of product. After inversion begins, traces of HFCS-55 in a sucrose-sweetened product could throw off a determination of 100% purity in the sweetener profile. Tr. 8334-35 (Cunningham). The inversion process begins soon

after packaging and could occur rapidly. Tr. 8341-42 (Cunningham). The accuracy of the sweetener profile declines rapidly as inversion occurs. Tr. 8342 (Cunningham).

94. The Court finds the Company had a legitimate, non-pretextual reason for instituting quality control procedures to ensure that the syrup sweetened with sucrose did not contain trace elements of HFCS-55.

95. Despite the Company's institution of the Sucrose Letter policy and concomitant quality control procedures, the plaintiffs remain low cost producers. Even without the HFCS pass through, plaintiffs have consistently paid a lower syrup price than the amended bottlers. Tr. at 1975-76 (Williams); Tr. at 9296-97 (Dorman); DX647; DX649. Moreover, plaintiffs' syrup costs are significantly lower than the syrup price paid by their main competitors, the Pepsico bottlers. Tr. at 7646-47 (Mellett); Tr. at 9296-97 (Dorman).

96. The Company's duty to promote Coca-Cola flows not only to plaintiffs, however, but to the entire bottling network. In their testimony, the Company's officials repeatedly stated their concern that the amended bottlers—which comprise 97% of the bottling system—be treated fairly. The duty to promote Coca-Cola is system-wide and entails more than a duty to see that the unamended bottlers achieve the lowest production costs possible. For instance, the duty would not require the Company to forego ordinary quality control measures, even though elimination of such procedures would lower the bottlers' costs.

H. *The Unamended Contracts Do Not Entitle Plaintiffs To Receive Concentrate*

97. The Consent Decrees and plaintiffs' unamended contracts provide solely for syrup and make no mention of concentrate.

98. The terms "syrup" and "concentrate" have different meaning within the soft drink industry and are not used interchangeably. DX1266 (Maly) at 7. "Concentrate" is a product which contains flavoring ingredients, but no sweetener and almost no water. Tr. at 1303-04 (W. Schmidt). "Syrup" as that term is used in the Consent Decrees and unamended contracts is a product which contains a sweetener and is used in the manufacture of soft drinks.

99. The 1978 Amendment gave amended bottlers the option to purchase concentrate for Coca-Cola if and when the Company decided to offer it for sale. PX880. More than 90% of the amended bottlers currently receive concentrate under a separate contract (the "concentrate amendment"). Tr. 7672 (Mellett) DX1157.

100. In 1921, other soft drink manufacturers sold concentrate rather than syrup. Admitted Facts, III.C. ¶¶ 120-21.

101. Many of the Coca-Cola bottlers in 1921 received concentrate to produce and sell ginger ale and fruit flavored drinks. Admitted Facts, III.C. ¶ 125 at 69.

102. The Court finds that the parties to the 1921 Consent Decrees and bottle contracts were aware of the possibility of using concentrate. Consequently, the use of concentrate in the manufacture and sale of soft drinks is not a situation wherein developing technology has created a product never contemplated by the contracting parties.

103. The sugar-based pricing mechanism of the Consent Decrees and unamended contracts fails to provide guidance for the pricing of concentrate—a product containing no sugar or sweetener of any kind—under the unamended contracts.

104. The parties' knowledge of concentrate in 1921 is evidence that their failure to provide for the use of concentrate in the Consent Decrees and unamended contracts was intentional.

105. A decree by this Court entitling plaintiffs to receive concentrate under their unamended contracts would be nothing more than the addition of a provision to the Consent Decrees and unamended contracts to which neither party assented in 1921.

CONCLUSIONS OF LAW

106. Under Count II, plaintiffs allege the Company breached its obligation to supply their requirements of "standard high grade Coca-Cola Bottlers Syrup" by providing them with only sucrose-sweetened syrups. They seek injunctive relief compelling the Company to supply them with syrup sweetened with HFCS-55 and monetary damages. Plaintiffs also seek punitive damages, alleging that the Company's acts in supplying them with sucrose-sweetened syrup and instituting certain quality control procedures breached the Company's duty to promote Coca-Cola under paragraph 1 of the Consent Decrees and its implied duty of good faith and fair dealing under the unamended contracts. They also seek an order entitling them to receive concentrate in lieu of syrup and interpreting the unamended contracts to provide for the use of sweeteners other than sugar and a pass through of the resultant savings. Before addressing the merits of plaintiffs' claims under Count II, the Court must first consider defendant's assertion that plaintiffs are judicially estopped from asserting that the syrup to which they are entitled under the unamended contracts can be sweetened with anything but 100% sucrose.

A. *Plaintiffs are not judicially estopped from asserting that their unamended contracts entitle them to receive syrup sweetened with HFCS-55.*

107. Defendant argues that plaintiffs should be judicially estopped from pursuing their Count II claims because of their repeated assertions in connection with their claims under Count I of this litigation that their bottle contracts entitle them to syrup sweetened with 100% sucrose and the decision of Judge Schwartz in *Coke III* resulting from those assertions. *See Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir.1953) ("A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention."); *see also Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir.1982); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166-69 (4th Cir.1982).

108. In support of its argument, the Company points to numerous instanceswherein various plaintiffs asserted that their contracts entitled them to sucrose-sweetened syrup. *See supra*. Contrary to the Company's contention, however, plaintiffs did not unequivocally assert under Count I that their contracts entitle them to syrup sweetened with sucrose *and only* sucrose. Rather, plaintiffs asserted that the Company was required to obtain their consent prior to changing the sweetener. This is evidenced by plaintiffs' prayer for relief in their original complaint, in which they requested that the Court enjoin the Company from providing them with anything other than sucrose- sweetened syrup *so long as* the Company refused to pass through savings from the use of a sugar substitute. *See also diet Coke V* at 116 ("The Court finds

it difficult to believe that the plaintiffs would have filed the Coke lawsuit if the Company had passed through the savings from using HFCS to unamended bottlers as well as amenders.").

109. Plaintiffs' claims under Count II do not contradict their position under Count I and during the *Coke III* trial because the plaintiffs have not unequivocally asserted a right to receive only syrup sweetened with sucrose. Therefore, the Court concludes that plaintiffs are therefore not judicially estopped from asserting under Count II that their contracts entitle them to syrup sweetened with HFCS-55. *See Edwards*, 690 F.2d at 598 ("The doctrine of judicial estoppel applies to a party who has successfully and *unequivocally* asserted a position in a prior proceeding....") (emphasis added); *see also Coke V* at 923 (plaintiffs are not judicially estopped from supplementing the complaint to request syrup sweetened with HFCS-55).

B. *The Company Has Not Breached the Unamended Contracts by Providing Plaintiffs with Syrups Sweetened with 100% Sucrose.*

110. Under paragraph FIRST of the bottling contracts, the parent bottlers were obligated to supply "sufficient syrup for bottling purposes to meet the requirements" of each actual bottler in its territory. Paragraph 10 of the Consent Decrees in turn provided that the syrup supplied to the parent bottlers by the Company would be "high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup."

111. The actual bottlers contracted to receive the same syrup that the parent bottlers were to receive from the Company pursuant to the Consent Decrees. Thus, paragraph FIRST of the unamended contracts incorporates the descrip-

tion of the syrup to which the parent bottlers were entitled pursuant to paragraph 10 of the Consent Decrees.

112. The language of the Consent Decrees should be construed as it is written, with the assumption that each party compromised part of its purpose to achieve the overall agreement. *See United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757-58, 29 L.Ed.2d 256 (1971).

113. Similarly, "[j]udicial construction of a contract requires a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties." 4 *Williston on Contracts* § 600A at 287 (quoting *Hunt v. Triplex Safety Glass Co.*, 60 F.2d 92, 94 (6th Cir.1932)).

114. Plaintiffs have failed to prove by a preponderance of the evidence that the term "standard" as it is used in paragraph 10's description of "Bottlers Coca-Cola Syrup" means "uniform."

115. Based upon the plain language of the Consent Decrees, the parties' contemporaneous usage, the knowledge and experience of the parties at the time they entered into the Consent Decrees, and the historic lapses in syrup uniformity within the Coca-Cola bottling system, the Court concludes that the term "standard" as used in paragraph 10 of the Consent Decrees describes the strength or quality of "Bottlers Coca-Cola Syrup." Use of the modifier "standard" does not mandate that the syrup received by all Coca-Cola bottlers, regardless of the contract under which they operate, be uniform.

116. The Court concludes that "high grade standard Bottlers Coca-Cola Syrup" therefore describes a syrup of a specific quality and strength. There is no evidence in the record that the 100% sucrose-sweetened syrup currently sup-

plied to plaintiffs is of a lesser quality than the "high grade standard Bottlers Coca-Cola Syrup [which] contain[s] not less than five and thirty-two one- hundredths (5.32) pounds of sugar to each gallon of syrup" for which the unamended contracts provide.

117. The Court also concludes that use of 5.32 pounds of sugar per gallon is a definitional characteristic of the syrup required by the unamended contracts and Consent Decrees according to the bargain struck by the parties in 1921. The language of the Consent Decrees and the unamended contracts taken as a whole, together with the parties' knowledge of and experience with substitute sweeteners prior to entry of the Consent Decrees in 1921, indicate that sugar was the only sweetener intended to be used in the syrup supplied pursuant to the unamended contracts. Absent a mutual agreement to amend the Consent Decrees or unamended contracts, the syrup supplied by the Company to the plaintiffs pursuant to the unamended contracts must contain 5.32 pounds of granulated sugar from cane or beet per gallon.

118. Although both parties have offered to amend the unamended contracts as they incorporate paragraph 10 of the Consent Decrees, neither party has manifested assent to the terms of the other's offer. Consequently, the Court concludes that there has been no mutual agreement to amend the unamended contracts to provide for use in the syrup of any sweetener other than 5.32 pounds of granulated sugar from cane or beet per gallon, and that sugar remains a defining characteristic of the syrup supplied to plaintiffs by the Company pursuant to the unamended contracts.

119. The amended bottlers operate under a contract, different from plaintiffs' unamended contract, which permits the Company to provide syrup sweetened with sweeteners,

such as HFCS-55, which are not "sugars" as that term is used in the Consent Decrees. The fact that the Company provides a syrup sweetened with HFCS-55 to the amenders, whose contract provides for use of such a sweetener, has no bearing on the Court's interpretation of plaintiffs' rights under a different contract.

C. *The Court Will Neither Rewrite the Consent Decrees and Unamended Contracts Nor Construe Them in Such a Way as to Add Terms Which Were Not Mutually Assented to by the Original Contracting Parties.*

120. The Court will not rewrite the Consent Decrees and the unamended contracts for the parties. It is not the Court's function to change the obligations of the parties under Consent Decrees and contracts which they saw fit to enter into. 4 *Williston on Contracts* § 610A at 513. In applying the principles of contract interpretation, the Court "must guard against inadvertently reforming a contract 'under the guise of construction' by 'looking too intently for means of bringing about some ultimate good, thwartingan apparent wrong, or preventing hardship....' " *Coke III* at 1397; *Coke 1920* at 805.

121. The Court will not construe the unamended contracts to include terms not assented to by the parties. *E.g., Levy v. Levy*, 130 Wis.2d 523, 388 N.W.2d 170, 174-75 (1986) ("In the guise of construing a contract, courts cannot insert what has been omitted or rewrite a contract made by the parties"); *E.E.E., Inc. v. Hanson*, 318 N.W.2d 101, 104 (N.D.1982) ("Normally, parties to a contract are allowed to write the terms of the contract themselves. A court may be called upon to interpret a contract written by the parties thereto but the court's authority to interpret a contract does not give a court the authority to modify it") (citation omitted); *Glantz*

Contracting Co. v. General Electric Co., 379 So.2d 912, 916 (Miss.1980) ("Courts do not have the power to make contracts where none exist, nor to modify, add to, or subtract from the terms of one in existence") (quoting *Citizens National Bank of Meridian v. Glascock, Inc.*, 243 So.2d 67, 70 (Miss.1971)); *Stull v. Hicks*, 59 Ill.App.3d 665, 16 Ill.Dec. 874, 876, 375 N.E.2d 981, 983 (1978) ("We are mindful of the fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise of construction").

122. Absent illegality, mistake, fraud, duress or unconscionability, it is not within the Court's power to revise, modify, alter, extend, or remake the parties' contract to include terms not agreed upon by the parties. *Texas Co. v. Todd*, 19 Cal.App.2d 174, 64 P.2d 1180 (1937); *Low v. Davidson Manufacturing Co.*, 113 F.2d 364 (7th Cir.1940); *Glantz Contracting Co. v. General Elec. Co.*, 379 So.2d 912 (Miss.1980); *Stull v. Hicks*, 59 Ill.App.3d 665, 16 Ill.Dec. 874, 375 N.E.2d 981 (1978); *St. Joseph Data Service, Inc. v. Thomas Jefferson Life Ins. Co. of America*, 73 Ill.App.3d 935, 30 Ill.Dec. 575, 393 N.E.2d 611 (1979).

123. The Court will not reform the contracts in the absence of a mutual mistake of integration, *Restatement (Second) of Contracts* § 155 & comment a, unilateral mistake induced by fraudulent misrepresentation, id. § 166, or impossibility of performance, H. Hunter, *Modern Law of Contracts: Breach and Remedies* ¶ 12.03 & 12.04 (1986). *See generally Restatement (Second) of Contracts* § 155 comment b ("If, however, the parties make a written agreement that they would not otherwise have made because of a mistake other than one as to expression, the court will not reform a writing to reflect the agreement that it thinks they would have made.").

124. The Court has previously concluded that the use of 5.32 pounds of granulated sugar from cane or beet in each gallon of syrup is a definitional characteristic of the syrup to be supplied to plaintiffs by the Company pursuant to the unamended contracts. Plaintiffs have presented no evidence of illegality, mistake, fraud, duress, impossibility, or unconscionability in the negotiation of the unamended contracts in 1921. At most, plaintiffs have shown only that technology may have rendered portions of the unamended contracts obsolete. The Court concludes that this showing is insufficient to induce the Court to modify the unamended contracts. If the world in which plaintiffs and the Company do business has changed in the past 70 years, it is up to the contracting parties and not this Court to modify their contracts accordingly.

D. *By Supplying Plaintiffs With Syrup Sweetened With 100% Sucrose, The Company Has Not Breached Its Implicit Duty of Good Faith and Fair Dealing.*

125. In addition to their request for specific performance, theplaintiffs seek damages under Count II from the Company for its alleged breach of the duty of good faith and fair dealing. They invoke section 205 of the *Restatement (Second) of Contracts*, which states: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

126. Plaintiffs Cleveland and Sacramento have contracts governed by the Uniform Commercial Code, which automatically attaches a duty of good faith to their contracts. *See* Cal.U.Comm.Code § 1203 (Deering 1991); Ohio Rev.Code Ann. § 1301.09 (Baldwin 1991). Of the remaining relevant jurisdictions, many have recognized either explicitly or implicitly a general obligation of good faith performance

implied in contracts at common law. *Ligon v. Parr*, 471 S.W.2d 1 (Ky.1971) (Kentucky) (court may impose a duty of good faith and fair dealing to prevent one party from impairing the ability of the other party to benefit from the contract); *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C.App. 743, 746, 253 S.E.2d 625, 627-28 (1979) (North Carolina) (recognizing duty of good faith and fair dealing); *Western Natural Gas Co. v. Cities Serv. Gas Co.*, 507 P.2d 1236, 1241 (Okla.), *cert. denied and app. dismd.*, 409 U.S. 1052, 93 S.Ct. 559, 34 L.Ed.2d 506 (1972) (same); *Beaugureau v. Beaugureau*, 11 Ariz.App. 234, 236, 463 P.2d 540, 542 (1970) (Arizona) (same); *In re Estate of Chayka*, 47 Wis.2d 102, 108, 176 N.W.2d 561, 564 (1970) (Wisconsin) (same); *Faust & Forden, Inc. v. Greenbaum*, 421 S.W.2d 809 (Mo.App.1967) (Missouri) (same); *see also Atlantic Richfield Co. v. Razumic*, 480 Pa. 366, 390 A.2d 736 (1978) (Pennsylvania) (implicitly recognizing the duty); *Ireland v. Charlesworth*, 98 N.W.2d 224 (N.D.1959) (North Dakota) (same). Two federal courts applying state law have found that the courts of Virginia and Arkansas would imply a duty of good faith performance of contracts in common law. *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C.Cir.1984) (Virginia); *Howard P. Foley Co. v. J.L. Williams & Co.*, 622 F.2d 402, 406-407 (8th Cir.1980) (Arkansas).

127. The Texas Supreme Court refused to find a general duty of good faith and fair dealing in contracts at common law in *English v. Fischer*, 660 S.W.2d 521, 522 (Tex.1983). The Texas courts subsequently found that there may be an implied duty of good faith when a "special relationship" exists between the contracting parties, such as when an element of trust is necessary to accomplish the goals of the contract or when there is unequal bargaining power. *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165 (Tex.1987), *modified on other grounds, Murray v. San Jacinto*

Agency, Inc., 800 S.W.2d 826 (Tex.1990); *City of San Antonio v. Forgy*, 769 S.W.2d 293 (Tex.App.1989). The Texas courts have held that no "special relationship" exists in ordinary commercial contractual relationships, such as the supplier-distributor relationship. *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477 (Tex.App.1989) (no special relationship between beer manufacturer and bottler). The plaintiffs in this case, "despite their long and mutually profitable relationship with the Company, are far from reposing in it complete trust and confidence...." *Coke VI* at 73-74. Although the Company may have greater economic strength and concomitantly greater bargaining power than the bottlers, the disparity does not rise to the type of "special relationship" contemplated by the Texas courts. This Court finds that the Texas courts would not imply the general duty of good faith and fair dealing in the contract between the Company and its bottlers. Consequently, plaintiff Laredo has no claim against the Company under Texas law for breach of the implied duty of good faith and fair dealing.

128. An action for breach of the implied duty of good faith and fair dealing has been perceived both as a cause of action in contracts and in torts. The Court finds that any claim plaintiffs may have for breach of the implied duty of good faith and fair dealing arises solely from their contractual relationship with the Company.

129. Courts and commentators have not articulated any particular standard for defining when there has been a breach of the duty of good faith and fair dealing. Frequently the line between a legitimate, but hard-nosed business decision and an action taken in bad faith is ambiguous and difficult to determine. It is clear, however, that when there is an implied duty of good faith performance, a breach of that duty should be

analyzed like a breach of any other contractual duty. That is, "[b]ad faith performance should be a breach of contract only if in important respects it is like a breach of contract by failing to perform as expressly promised." Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv.L.Rev. 369, 373-74 (1980).

130. The duty of good faith and fair dealing apparently has two elements: "good faith" and some sort of "dealing." That is, in order to breach the implied duty, a party must engage in a dealing, i.e., take some kind of action, and the party must have taken that action in bad faith. Plaintiffs allege both elements. They allege the Company took an action—supplying them with syrup sweetened with 100% sugar instead of HFCS-55,[8] and they allege the Company was acting in bad faith.

131. Obviously, the implied duty of good faith and fair dealing may be breached when a party acting in bad faith fails to perform its express obligations under the contract,

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[8] To the extent the plaintiffs rely on the Sucrose Letter of March 16, 1987 as a "dealing" in breach of the duty of good faith and fair dealing, the action of the Company in issuing that letter is, for purposes of this claim, a part of its larger action of supplying plaintiffs with sucrose- sweetened syrup. Plaintiffs cite §§ 175 and 176 of the *Restatement (Second) of Contracts* in support of their position that the Sucrose Letter constituted an independent breach of good faith and fair dealing. Section 175 addresses the issue of when a contract is voidable because assent was manifested under duress. Plaintiffs argue that the Sucrose Letter in combination with the Company's announcement of its intention to withdraw the 1978 and 1983 Amendments constituted an improper threat. If plaintiffs had entered into new contracts with the Company as a result of these actions, § 175 might be applicable. However, plaintiffs refused to sign the 1978 or 1983 Amendments, and they have not entered into any new contracts with the Company as a result of the Sucrose Letter. They certainly have not manifested assent as to any action taken by the Company which bears on the issues of this litigation. Consequently, plaintiffs' reference to § 175 is irrelevant to their claims under Count II.

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such as when an insurer intentionally fails to honor a policy claim. The implied duty may also be breached even though both parties act within their contractual rights. For example, an employer's attempt to reduce his salesperson's compensation through the exercise of his contractually conferred powers to adjust the salesperson's commission quota and to terminate employees at will would be a breach of the employer's duty of good faith performance. *See Tymshare, Inc. v. Covell*, 727 F.2d at 1154-55. Likewise, an insurer's failure to exercise its power to authorize medical treatment until after the insurance contract's cut-off date for payment for treatment would breach the insurer's duty of good faith performance. *See Gallimore v. Daniels Construction Co.*, 78 N.C.App. 747, 338 S.E.2d 317 (1986).

132. On the other hand, a party exercising its contractual rights does not breach the implied duty of good faith and fair dealing merely because the exercise of its rights disadvantages the other party to the contract:

> It seems reasonably clear from the decided cases that a lending institution does not violate a separate duty of good faith by adhering to its agreement with the borrower or by enforcing its legal

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Footnote continued from previous page

Similarly, § 176 addresses when a threat is improper for purposes of making a showing of duress. Subsection 176(d) states that a threat is improper if it is a breach of the implied duty of good faith and fair dealing. While the Sucrose Letter might well be considered a threat, reference to § 176(d) for purposes of plaintiffs' good faith and fair dealing claim is meaningless, since the subsection does not offer any standard fordetermining the ultimate issue of whether a threat constitutes a breach of the implied duty.

Finally, plaintiffs have not alleged any harm caused to them by the Sucrose Letter beyond the fact that it induced many of their fellow bottlers to sign the 1978 and 1983 Amendments. Their alleged harms arise from the actual carrying out of the threat contained in the Sucrose Letter and from the institution of the quality control procedures.

> and contractual rights as a creditor. The duty of good faith imposed upon contracting parties does not compel a lender to surrender rights which it has been given by statute or by the terms of its contract. Similarly, it cannot be said that a lender has violated a duty of good faith merely because it has negotiated terms of a loan which are favorable to itself. As such, a lender generally is not liable for harm caused to a borrower by refusing to advance additional funds, release collateral, or assist in obtaining additional loans from third persons. A lending institution also is not required to delay attempts to recover from a guarantor after the principal debtor has defaulted.

Creeger Brick and Building Supply Inc. v. Mid-State Bank and Trust Co., 385 Pa.Super. 30, 560 A.2d 151, 154 (1989).

133. In supplying plaintiffs with sucrose-sweetened syrup, the Company was not only acting within its contractual rights, it was in fact performing an express obligation of plaintiffs' unamended contracts. This is not a situation in which the Company did something that the contracts *permitted;* rather, the Company was obligated by the express terms of the contracts to supply plaintiffs with syrup containing 5.32 pounds of sugar. The question for the Court thus becomes whether the Company's performance of an express contractual obligation can give rise to a breach of its implied duty of good faith and fair dealing under its contracts. Phrased differently, so long as the Company is performing in conformity with the express terms of the contracts, can its hope that its performance will harm the plaintiffs, without more, be a breach of its duty of good faith performance?

134. The *Restatement (Second) of Contracts* appears to rec-

ognize the possibility that the implied duty may be breached by performance in bad faith. The types of potentially actionable bad faith listed by the *Restatement*, while not exhaustive, are illustrative: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." *Restatement (Second) of Contracts* § 205 comment d. Plaintiffs allege that the Company's action in supplying them only with syrup sweetened with sucrose evaded the spirit of their bargain and interfered with their ability to perform their obligations under the contract.

135. Plaintiffs allege that by supplying them with sucrose-sweetened syrup the Company breached its contractual duty to promote Coca-Cola. *See* Consent Decrees, paragraph 1 ("It being recognized that the primary obligation of all parties hereto ... is to promote the sale of Coca-Cola...."). Plaintiffs argue that the Company's action has made it difficult for them to participate in the interdependent bottling network. They also argue that by selling them sucrose-sweetened syrup at a sucrose-based price, the Company prevents them from being lowest-cost producers. Plaintiffs' arguments suffer from two fatal flaws.

136. First, plaintiffs' arguments ignore the fact that the Company is contractually obligated under plaintiffs' contracts to supply sucrose-sweetened syrup. As has been stated previously in this Opinion, the parent bottlers in 1921 were dissatisfied with substitute sweeteners and intended that the syrup be sweetened only with sugar. Implicit in the plaintiffs' contracts is the assumption that use of syrup sweetened only with sucrose would best promote Coca-Cola. If that assumption is no longer applicable, the parties and not the

Court must modify their contracts accordingly. *See Restatement (Second) of Contracts* § 155 comment b ("If, however, the parties make a written agreement that they would not otherwise have made because of a mistake other than one as to expression, the court will not reform a writing to reflect the agreement that it thinks they would have made.").

137. Second, plaintiffs' arguments ignore the fact that—even paying the sucrose-based syrup price—plaintiffs pay the lowest syrup price of any soft drink bottler. Plaintiffs receive a high quality syrup at a competitive price. The Company's action has not impaired to any actionable degree plaintiffs' ability to perform their obligations under the contracts to "properly and vigorously push the sale of bottled Coca-Cola." *See* Bottle Contracts, paragraph SIXTH.

138. Plaintiffs' good faith and fair dealing claim insofar as it concerns the provision of sucrose-sweetened syrup is really a way of trying to convince the Court indirectly to modify their contracts to entitle them to syrup sweetened with HFCS-55. The Court will not do indirectly what it declined to do directly. Although the obligation of good faith and fair dealing may be used to imply contract terms when a contract is ambiguous, it cannot alter an express term of the contract. *See, e.g., April Enterprises, Inc. v. KTTV,* 147 Cal.App.3d 805, 195 Cal.Rptr. 421, 425 (1983) ("The traditional rule ... is to the effect a covenant of fair dealing will not be implied to vary the terms of an unambiguous contract"); *Balfour, Guthrie & Co. v. Gourmet Farms,* 108 Cal.App.3d 181, 166 Cal.Rptr. 422, 427 (1980) ("Nevertheless, the duty to act in good faith does not alter the specific obligations of the parties under the contract.").

E. *The Company's Institution of Quality Control Procedures Did Not Violate Its Obligation of Good Faith and Fair Dealing.*

139. Plaintiffs' claim that the Company's institution of quality control rinsing procedures violated its implied obligation of good faith and fair dealing presents a slightly different question. While they do not contest that the unamended contracts permit the Company to require the bottlers to follow reasonable quality control procedures, plaintiffs argue that the procedures instituted by the Company in connection with its decision to supply them with syrup sweetened only with sucrose violated the implied duty of good faith and fair dealing because the procedures were so unduly burdensome as to disrupt plaintiffs' ability to carry out their businesses.

140. The Court concludes that the Company's election to give plaintiffs the option of receiving sucrose-sweetened syrup, amending their contracts, or continuing to receive HFCS-sweetened syrup and waiving future damages was a legitimate business decision. The Company gave a number of reasons for the decision, including the judgment of Company officials that continuing to supply plaintiffs with HFCS-sweetened syrup without passing through the savings might be construed as a violation of Judge Schwartz' rulings in *Coke III* and *Coke IV*, the Company's desire to limit its damages under Count I, its desire to remove plaintiffs' incentive for further litigation, and its concern about reaction of the amended bottlers. The Court concludes the Company had legitimate, nonpretextual business reasons for its course of action.

141. The Court concludes the Company's decision to implement quality control procedures for processors that handle syrups sweetened with sucrose and HFCS-55 was a legitimate business decision. Company officials testified that some sort of rinsing procedure was necessary in order for the

Company's quality control analysts to be certain that plaintiffs were receiving syrup sweetened only with sucrose in accordance with their unamended contracts. The Court finds this was a legitimate business purpose.

142. Plaintiffs have failed to prove by a preponderance of the evidence that the Company instituted the quality control procedures for the sole purpose of disrupting plaintiffs' businesses. To the contrary, the evidence shows that the Company could have imposed significantly more onerous procedures if its sole intent had been to make things more difficult for plaintiffs. *See supra.*

143. Because the Company had a legitimate business purpose and imposed relatively less burdensome procedures, the Court concludes the Company's institution of quality control procedures did not constitute a breach of its implied duty of good faith and fair dealing.

144. The Court concludes that the actions taken by the Company in response to Judge Schwartz' rulings in *Coke III* and *Coke IV*, seen in the context of the entire bottling system, did not breach the Company's duty pursuant to paragraph 1 of the Consent Decrees to promote the product Coca-Cola.

F. *Plaintiffs Are Not Entitled To Receive Concentrate Under Their Unamended Contracts.*

145. The Court concludes that the evidence that the parties in 1921 were familiar with the use of concentrate in the manufacture of soft drinks, their failure to provide for the use of concentrate in the Consent Decrees and unamended contracts, and their use of a sugar-based pricing mechanism of the Consent Decrees and unamended contracts, which takes no account of products which contain no sugar nor any sweetener whatsoever, demonstrate that plaintiffs are not

entitled to receive concentrate under their unamended contracts as written.

146. The Court will not interpret the unamended contracts and Consent Decrees to include terms which were not assented to by the parties. Although the use of concentrate might well benefit both sides of this litigation, it is up to the parties and not the Court to alter their contractual relationship to provide for the use of a product not covered by their current contracts.

COUNT III

FINDINGS OF FACT

A. *Introduction and Contentions.*

1. Paragraph 6 of the Consent Decrees and paragraph FOURTH(d) of the unamended contracts fix the price of a gallon of syrup at $1.30. The syrup price increases from the $1.30 base amount at a rate of six cents (6¢) for every one cent (1¢) increase in the price of sugar over seven cents (7¢) per pound. Paragraph 7 of the Consent Decrees and paragraph FOURTH(d) of the unamended contracts set forth the method for calculating the price of sugar for purposes of the sliding scale pricing mechanism of paragraph 6:

> the price of sugar is to be determined quarterly, January, April, July and October in each year by averaging the market price of standard granulated sugar during the first week in such quarter, as quoted at the refineries by the ten refineries operating in the United States of America at the time, having the largest capacity and output.

2. In *Coke III*, Judge Schwartz defined "market price" of standard granulated sugar as that term is used in paragraph 7 as:

> an average of the price per pound for refined granulated sugar of the grade and in the packaging unit in which it is principally sold to industrial users f.o.b. the refinery, as made known to such industrial users upon inquiry prior to sale by the ten refineries in the United States with the largest capacity and output during the first seven days of each calendar quarter, less any discounts, allowances, or rebates from that price which are available to industrial users or are made known to them upon inquiry prior to sale, but not including a standard two percent cash discount or any individually negotiated discounts, allowances or rebates.

Coke III at 1418.

3. In Count III, plaintiffs allege that, since 1969, the Company has overcharged them for syrup because the sugar price used by the Company in its syrup price calculations has been higher than the "market price" as defined by Judge Schwartz. Plaintiffs allege that prior to 1969, the Company undertook an independent investigation each quarter to inquire of the ten largest refiners their market price of sugar for the first seven days of the quarter. Plaintiffs contend that in 1969 the Company abruptly ceased this practice and began to rely exclusively on "list" prices, that is, prices found in the refiners' published price lists, in brokers' reports, and in trade publications such as the *Daily Sugar Trade Journal* published by Willett & Gray (referred to hereinafter as "Willett & Gray") until it ceased publication in 1979.

Plaintiffs contend that market price, as defined by Judge Schwartz, is a different price than list price; that since 1969, the market price of the ten largest refiners has consistently been lower than the list price used by the Company in its syrup price calculations; and that the Company's use of list prices has resulted in plaintiffs' being overcharged for syrup in each quarter since 1969.

4. The Company contends that plaintiffs waived or are estopped from raising their claims with regard to market price. The Company primarily bases its estoppel argument on the fact that many of the plaintiffs purchase sugar for use in bottling products other than Coca-Cola. The Company asserts that plaintiffs, as participants in the refined sugar market, could have discovered that the Company used list prices to calculate the syrup price simply by comparing the prices they themselves paid with the market price of sugar disclosed by the Company as part of its syrup price notice to the bottlers. Because plaintiffs could have discovered its use of list price to calculate the syrup price at an earlier date, the Company urges that the plaintiffs' failure to object to the use of list prices sooner constitutes a waiver of their right to do so or estops them from doing so.

5. The Company further contends that (1) list price is the only price which conforms to Judge Schwartz' definition of market price and (2) that there has been no abrupt change in practice because the Company has always relied primarily on the list prices published in Willett & Gray and other trade journals, along with the refiners' price lists, when calculating plaintiffs' syrup price.

B. *The Language of the Contract and Usage in the Trade*

6. The fact that the Consent Decrees and the bottling contracts use the term "market price" instead of "list price"

means very little in light of the confusion surrounding pricing terminology in the refined sugar industry.

7. There appears to be no consensus among members of the refined sugar trade as to the meaning of the term "market price." *See* Tr. at 7066 (Nagle) (people within the refined sugar industry could disagree on the meaning of the term "effective market price"); Tr. at 7410 (Fuchs) (market price is a "vague" term which "could mean anything" depending upon the person using it); Tr. at 8503 (Ruffolo) (the term market price "means many things to many different people"). Consequently, there is no consensus that the term "market price" means an "effective selling price" as opposed to "list price."

8. Moreover, there seems to be no standard usage in the sugar industry regarding any of the sugar pricing terms which frequently appear in the evidence for Count III. For instance, William Nelson of the Great Western Sugar Company and Godchaux-Henderson referred to "market price" as actual selling prices rather than prices made available upon inquiry prior to sale, which he termed "daily competitive price." Tr. at 6170-171; 6415-416; 6499-500 (Nelson). Robert Nagle, who was employed by both Amstar Corporation and C & H Sugar, defined both "market price" and "effective selling price" as prices that are generally available. Tr. at 6763 (Nagle). Nagle also stated that the terms "market price," "effective market price," "effective selling price," and "going price" could be used interchangeably, depending upon the context. Tr. at 7022-23 (Nagle). Spencer Fuchs, a sugar broker, equated the terms "selling price" and "competitive price." Tr. at 7340 (Fuchs). He stated, however, that "market price" was not the same thing as "effective selling price" and that "market price" was a vague term that could mean anything depending upon the person using it.

Tr. at 7410-411 (Fuchs). In fact, Fuchs expressed disagreement with the definition of "market price" set forth by Judge Schwartz. Tr. at 7407 (Fuchs).

C. *The Prices Published in Willett & Gray and Other Sugar Price Publications, Including Price Lists, Satisfy the Court's Definition of Market Price.*

9. The parties to the 1921 Consent Decrees and the unamended bottling contracts had two objectives when they devised the pricing scheme for the syrup. First, they wanted to ensure that the actual bottlers would receive syrup at a competitive price. Second, they sought a price that was mutually verifiable. *See Coke III* at 1407.

10. At the time they entered into the 1921 Consent Decrees and derivative unamended bottling contracts, the bottlers greatly distrusted the Company in light of their experiences with the Company's insistence upon recouping at their expense its losses from unwise sugar purchases during pendency of the litigation and the Company's refusal to allow them to inspect its books in order to verify its cost of sugar. *See supra; see also Coke III* at 1408.

11. The unamended contracts of the Thomas Company bottlers contains the following language in paragraph FOURTH(d):

> [B]ut the ten refineries whose prices are to be used in obtaining the average price as herein stated and the fixing of that market price shall be as determined by the party of the first part [Thomas Company] and The Coca-Cola Company.

Plaintiffs describe the obligation of the Thomas Company under this contract provision as that of "Policing the [Coca-Cola] Company's Performance" under the pricing provi-

sions. Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 237 (Dkt. 897). The Thomas Company expressed its understanding of its obligation in an April 24, 1947 letter to the Company: "It would appear from [paragraph FOURTH(d)] that Thomas has an obligation to its bottlers to know something about the selection of the refineries whose quotations are being used and that it also has an obligation in the fixing of the market price together with The Coca-Cola Company." PX809. In fact, the now-infamous Hodgson Memorandum, *see infra*, resulted from the efforts of the Thomas Company to satisfy its obligation.

12. The fact that the Thomas Company had a "policing" role in the determination of market price indicates that the market price calculated by the Company was intended to be a price which could be verified by the Thomas Company.

13. Plaintiffs argue that the only "verifiability" intended by the parties in 1920 was that the price be "verifiable in the sense that it was not subject to one party's manipulation or control." Plaintiffs' Proposed Findings of Fact and Conclusions of Law ¶ 1164 at 294. Plaintiffs argue that their version of "market price" meets this definition because the price at which sugar refiners sell to industrial users is not subject to the Company's control.

14. Plaintiffs' argument regarding the type of "verifiability" desired by the parties in 1921 is unpersuasive.

15. Plaintiffs' citations to Judge Schwartz' comments in *Coke III* do not support their position. Judge Schwartz recounted that, in response to the Company's representations under the June 10 order that its prices were increased, the bottlers "in disbelief, demanded verification of the Company's figures." *Coke III* at 1395. Plaintiffs also cite to Judge Schwartz' statement that the parent bottlers were

unable to reconcile their audit figures with the Company's figures. *Id.* at 1395; Plaintiffs' Proposed Findings of Fact and Conclusions of Law ¶ 1164 at 294. Finally, plaintiffs quote Judge Schwartz' comment that "Also apparent ... is the bottlers' concern with verifying the Company's cost figures." *Coke III* at 1408; Plaintiffs' Proposed Findings of Fact and Conclusions of Law ¶ 1164 at 294. Judge Schwartz' comments do not support plaintiffs' assertion that in 1920 the bottlers only wanted to assure themselves that the basis for their syrup price was beyond the Company's control. If anything, Judge Schwartz' statements indicate that the bottlers wanted to be able to ascertain *for themselves* the accuracy of the Company's figures. Not only is this interpretation in line with Judge Schwartz' comments and the evidence before the Court, but it also makes the most sense in light of the Thomas Company's policing role.

16. Plaintiffs assert that the Company's acquisition of the Thomas Company conferred upon the Company the Thomas Company's price policing role. According to plaintiffs, this in turn created in the Company a fiduciary duty to plaintiffs with respect to calculation of the syrup price. Such an interpretation, however, would nullify the contracting parties' intent in 1920 and 1921 that the syrup price be verifiable. This may be demonstrated by analogy to the effect of the dissolution of the Thomas Company upon the parent bottlers' right to consent to a change in sweetener.

17. The plaintiffs have argued successfully both before Judge Schwartz and during this trial that the dissolution of the Thomas Company did not relieve the Company of its duty to use 5.32 pounds of sugar per gallon of syrup but rather conferred upon the plaintiffs the parent bottlers' right to consent to any change in the sweetener. Phrased different-

ly, plaintiffs' assertion, which has been accepted by the Court, is that it would be nonsensical to confer upon the Company the parent bottlers' right to consent to a change in sweetener because this would leave the Company free to evade the spirit and letter of the contract. Likewise, it would be nonsensical, upon the dissolution of the parent bottlers, to assign to the Company the Thomas Company's price policing role because such an assignment would leave the Company free to evade the provisions of the Consent Decrees and unamended contracts.

18. Dissolution of the parent bottlers did not suddenly impose a fiduciary duty upon the Company. The Company and the unamended bottlers continue to be arms-length bargaining partners. *See Coke VI* at 73. During the negotiations regarding the 1978 Amendment, for example, the bottlers demonstrated that they are very far from reposing in the Company their blind trust when it comes to matters which affect their bottom lines. *See, e.g.*, DX498 (letter dated 5/9/78 from Bill Schmidt to Luke Smith, President of the Coca-Cola Company expressing disagreement over Company's proposals); DX499 (letter dated 5/14/78 from Schmidt to bottlers outlining concerns about proposed amendment); DX535 (letter dated 9/4/78 from Schmidt to bottlers discussing his concerns after "seriously studying the Amendment").

19. In light of the foregoing, the Court finds that the intent of the pricing provisions of the Consent Decrees and unamended contracts continues to be to provide a syrup price which is both competitive and mutually verifiable.

20. The list price is a price that may be easily verified by both the bottlers and the Company. List price is the only price which the refiners will verify in writing. *See, e.g.*, Tr. at 7000 (Nagle). In addition, every trade, government, and bro-

ker publication which publishes sugar prices publishes the refiners' list prices. Tr. at 7000 (Nagle); Tr. 7384-89 (Fuchs); Tr. 8500-501 (Ruffolo). Moreover, the majority of refiners testified that in response to an inquiry seeking their "market price" as defined by Judge Schwartz, they would give their list price. Tr. 8640-41 (Hanna); Tr. 8809 & 8857 (Tindall); *see also* Tr. 8504 (Ruffolo) (broker would expect refiners to give list price in response to court's definition); PX2832 at 375-76 (deposition of R. Satola of Amstar Corp.); PX2837 at 176 (deposition of C. Richard Donnelly of Savannah Foods & Industries, Inc.); PX2844 at 151-53 (deposition of R. Conlin of Supreme Sugar, Inc.); *but see* PX2839 at 376-80 (deposition of E. Motyka of Colonial Sugar, Inc.).

21. Beginning October 1, 1987, the Company, in response to Judge Schwartz' opinion in *Coke III*, began soliciting pricing information from the refiners by sending to the refiners requests for pricing information which incorporated the language of Judge Schwartz' market price definition. *E.g.*, DX985 at P007403-P007417; DX988 at P004133. The refiners generally responded with their list prices. *E.g.*, PX2832 at 373 (deposition of R. Satola of Amstar Corp.); DX985 at P007472 (Imperial Sugar; October, 1987); DX985 at P007473 (Savannah Sugar; October, 1987); DX985 at P007474 (Everglades Sugar; October, 1987); DX985 at P007475 (Colonial Sugar; October, 1987); PX985 at P007476 (Amstar; October, 1987); DX985 at P007477 (Supreme Sugar Co.; October, 1987). Refined Sugars, Inc. replied to the Company's inquiry by stating that it was uncertain as to what exactly the Company was requesting and assumed the Company desired its list price. DX985 at P007419.[9]

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[9] Plaintiffs argue that the refiners responded to the Company's market price inquiries with their list prices because they "knew, or at the very least suspected based on the Company's prior inquiries for list price,

Footnote continued on next page

22. The Company's use of list prices as the basis for calculating the bottlers' syrup price has yielded a syrup price which enables the bottlers to compete effectively. Plaintiffs remain low cost producers, consistently paying a lower syrup price than the amended bottlers and the Pepsico bottlers. Tr. at 1975-75 (Williams); Tr. at 9296-97 (Dorman); Tr. at 7646-47 (Mellett); DX647; DX649.

23. In light of the foregoing, the list price is a price which both yields a competitive syrup price and is mutually verifiable. Consequently, the list price is a price which satisfies the intent of the Consent Decrees and the unamended contracts.

D. *Plaintiffs Have Not Proven By a Preponderance of the Evidence That There Exists an "Effective Selling Price" Lower than the List Prices Which is Made Known to Large Industrial Users Upon Inquiry Prior to Sale.*

24. Plaintiffs allege that there are three prices for sugar: the "list" price published in the refiners' price lists and in

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Footnote continued from previous page

that the Company wanted list price information." Plaintiffs' Proposed Findings of Fact and Conclusions of Law ¶ 1339 at 337 (Dkt. 897). Nevertheless, the fact that the refiners sent their list prices in response to Judge Schwartz' market price definition is entitled to substantial evidentiary weight, especially when considered with the refiners' testimony that they would quote list price in response to a pricing inquiry phrased in terms of Judge Schwartz' definition.

Plaintiffs also argue that the portions of the refiners' testimony favorable to the Company's position should be disregarded. Plaintiffs urge that the refiners' testimony is influenced by bias or, at the very least, by a desire to curry favor with the Company in light of the Company's substantial sugar purchases. The bias of the refiners is questionable, however, in light of the fact the Company's decision to use HFCS in its syrups has drastically reduced its sugar needs. At least one bottler testified that the switch by the Company to HFCS adversely affected the cane sugar industry. Tr. at 9072-73 (Harder). Moreover, at least one of the refiners who testified favorably with regard to the Company's position has retired and therefore would not be influenced by any desire to procure the Company's sugar business. Tr. at 8781 (Tindall).

trade journals, such as Willett & Gray; an "effective selling price," which is lower than list price and available to large industrial users upon inquiry prior to sale; and individually negotiated prices. They contend that the "effective selling price" is the only price which fits Judge Schwartz' definition of market price.

25. Plaintiffs have proven by a preponderance of the evidence that there has existed at times a substantial amount of selling at off-list prices in the sugar industry. *See, e.g.*, Tr. at 6170-171 (Nelson) (majority of Godchaux- Henderson sales occur at lower than list); Tr. at 6703 & 6725 (Nagle) (in 1971, Amstar sold a majority of its sugar off-list); Tr. at 6855 (Nagle) (Amstar sells the overwhelming majority of its sugar below list and very little at list); Tr. at 7294 (off-list pricing began in the early 1960's; by the late 1960's most sales occurred at off-list prices); Tr. at 8483 & 8532 (Ruffolo) (amount of sugar sold off-list depends upon the market cycle); Tr. at 8611 (Ruffolo) (since 1966, there have been periods where most sugar is sold off-list); Tr. at 8633 (Hanna) (majority of Imperial Sugar's sales occur off list at a range of prices).

26. Plaintiffs have *not* proven by a preponderance of the evidence, however, that list price is a wholly fictitious price. Instead, witnesses described the level of off-list pricing as the "the majority" of sales, Tr. at 6170-171 (Nelson); Tr. at 6703 & 6725 (Nagle); Tr. at 8233 (Hanna), or "overwhelming majority," Tr. at 6855 (Nagle). By definition, if a majority of sales occur off-list, then some significant portion of sales occurs at list price.

27. The evidence shows that in the relevant time period there were always at least some sales at list price. Tr. at 7384 (Fuchs) (there has always been some sugar sold to some industrial users at list); Tr. at 7390-91 (Fuchs) (there are some accounts that buy at list, few as they may be); Tr. at 8483

(Ruffolo) (at all times McKeany-Flavell has brokered some sales of sugar to industrial customers at list price); Tr. at 8611 (Ruffolo) (since 1966, there have been some periods where most sugar sold off-list and other periods where most sugar sold at list price); Tr. at 8632 (Hanna) (at all times Imperial has sold some sugar at list price, although the percentage has decreased in the last ten years).

28. Moreover, there have been periods of time during the 1970's and early 1980's in which the majority of sugar sold was sold at list price. For instance, Robert Nagle, one of plaintiffs' witnesses, testified that Amstar lowered its list price and attempted to sell only at list in the fourth quarter of 1972. Tr. at 6898 (Nagle). Nagle testified that from early 1974 through the first quarter of 1975, list price was a "meaningful" price. Tr. at 7186 (Nagle). He also testified that from 1975-1977 there was a mixture of list and off-list selling. Tr. at 7189-190 (Nagle). In 1979, C & H Sugar experienced a "mixed bag"—selling a fair amount of sugar both at list and under list. Tr. at 6954 (Nagle). In 1980, C & H Sugar sold a majority or close to a majority of its sugar at list price. Tr. at 6956 (Nagle).

29. Spencer Fuchs, another witness for plaintiffs, testified that in 1972 Amstar introduced a "bonus plan" to encourage its brokers to sell sugar at list price. Fuchs testified that prior to the introduction of the bonus plan, 30% of Fuchs' sales volume to industrial customers was sold at list. After the bonus plan went into effect, the figure went as high as 90%. Tr. 7358-359 (Fuchs).

30. Judge Schwartz' definition of market price states that "market price" is a price made available upon inquiry prior to sale—*not* an actual sales price. The plaintiffs have not proven by a preponderance of the evidence that there

exists a verifiable price or range of prices, other than list price, which are available upon inquiry prior to sale. Phrased differently, plaintiffs have been unable to prove by a preponderance of the evidence any method for determining the "effective selling price" for the first seven days of any given quarter other than by averaging retrospectively the prices at which sales occurred during that period. An average sales price calculated after the fact is simply not the same thing as a price made available upon inquiry prior to sale. [10]

31. Plaintiffs' witnesses describe the existence of an effective selling price vaguely, as something which is "known" in the market. *E.g.*, Tr. at 7391 (Fuchs); Tr. at 6806 (Nagle) ("known and available" in the market); *see also* Tr. at 7034 (Nagle) ("Again these things vary with market conditions. I think we know what we are talking about....").

32. The determination of the "effective selling price" on a given day in a given territory is complicated by the fact that such an "effective selling price" may change in the course of a day within a given territory. *E.g.*, Tr. at 6380-81 (Nelson) (Godchaux-Henderson daily competitive price could vary from territory to territory and change in the course of a day within a given territory); Tr. at 7040 (Nagle) (typically, given "normal" competitive conditions, there could be some variations in prices in a particular market territory).

33. In fact, several witnesses acknowledged that persons knowledgeable about the sugar industry and market could disagree as to the "market" or "effective selling" price of

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[10] The Court notes that this discussion is not intended to have any bearing on the sufficiency of plaintiffs' damages evidence. Rather, in this section, the Court is interpreting contract language which was intended to govern the parties' conduct prospectively.

sugar on a given day. *E.g.*, Tr. at 6716 (Nagle) (there could be "differences of opinion" as to the effective selling price in various competitive areas or territories on a given day because "everybody has their own source of information"); Tr. at 6718 (Nagle) ("[T]here can be differences in what people perceive to be the effective selling price"); Tr. at 8503 (Ruffolo) (it is possible for two persons knowledgeable about the sugar industry to disagree about the market price of sugar on a given day).

34. One of plaintiffs' witnesses acknowledged that he would occasionally have "differences of opinion" with Coca-Cola Company officials regarding the "market price" of sugar:

> There were sometimes situations where it was necessary for the [the Company and C & H Sugar or Spreckles Sugar] to determine what the market price—what they both agreed the price was in the market that should be treated as the market price.
>
> And obviously, there would be discussion among the parties in terms of what they believed the market price was based on their information in the market.

Tr. at 6981 (Nagle); *see also* Tr. at 6974 (Nagle) ("Well, sometimes we would have a different view on what we thought [the market price] was in a particular market.").

35. Plaintiffs point to the business records of various refiners as sources of a "market" price other than list price available to industrial users on inquiry prior to sale.

36. One of the types of business records on which plaintiffs focus is the "Black Book" entries kept by C & H Sugar Co. The Black Book is an internal C & H memorandum of

conversations on behalf of C & H with some of its customers regarding sugar sales.

37. Plaintiffs assert that the prices recorded in the Black Book reflect the "market price" of sugar, as defined in *Coke III*, at the time of each entry. The Black Book entries, however, are not reflective of the price of sugar generally available to industrial users upon inquiry. Edward F. Harder, who for many years was the person primarily responsible for maintaining the Black Book, testified regarding these records. Although Harder had originally been retained by plaintiffs, he was called to testify in this trial by the Company. Tr. 6750-52.

38. Harder characterized the entries in the Black Book as exceptional sales—not sales made in the ordinary course of business. Tr. 9046 (Harder).

39. For example, in the years prior to 1980, C & H made approximately 150 to 300 sales of sugar *per day*. However, there are only two or three Black Book entries *per week* during the 1970's. Tr. 9073 (Harder). According to Harder, the sales prices of sugar in the Black Book entries reflect only the selling prices to the particular customers listed. Tr. 9155 (Harder).

40. Generally, the Black Book entries reflected prices discussed only with "major" customers willing to make substantial tonnage commitments. Harder noted that these were the types of customers who usually negotiated individual discounts. Tr. 9058-59 (Harder).

41. Many of the Black Book entries offered by plaintiffs concern discussions between C & H and the Coca-Cola Company regarding implementation of "market less-X" contracts. Under these contracts, the Company purchased sugar at price defined as a "market price" minus an allowance. C &

H and the Company would agree on a "market price" for whatever days the Company drew down a shipment of sugar.

42. The testimony concerning the "market less-X" contracts indicates that the "market price" used in the contracts was generally either the list price, Tr. 9079 (Harder), or the result of negotiations between the Company and C & H. Tr. 9077, 9079-84 (Harder).

43. Harder stated that the "market price" used in the "market less-X" contracts was not a price at which C & H would offer to sell to all customers in the relevant geographical area, Tr. 9084 (Harder), nor was it a price which met Judge Schwartz' definition, Tr. 9048 (Harder).

44. Furthermore, the Court has previously ruled that, when determining the market price of sugar, the Company has never taken into account its own negotiating experience and has no duty to do so. *Coke III* at 1418. In fact, plaintiffs themselves have conceded: "Under the Consent Decrees and the bottlers' contracts, the Company is allowed to increase its profit without increasing the bottlers' syrup price by beating the index, *i.e.*, purchasing the sweetener used in the syrup at less than the market price." Plaintiffs' Proposed Findings of Fact and Conclusions of Law ¶ 843 at 203.

45. Plaintiffs also point to the business records of the Godchaux-Henderson refiner. Plaintiffs offer the testimony of William Nelson, a former Godchaux- Henderson employee, as evidence of a "daily competitive price" below Godchaux- Henderson's list price which was offered to the market. The Court finds Mr. Nelson's testimony as to the existence of a daily price below Godchaux- Henderson's list price unpersuasive. For example, the Court notes that despite Mr. Nelson's insistence that the "daily competitive price" was telexed *daily* to brokers, the exhibit prepared by

plaintiffs with the aid of Mr. Nelson allegedly demonstrating the market price for Godchaux-Henderson for the first seven days of every quarter from 1976-1983 contains only six telexed prices out of a possible seventy-odd entries. Tr. 6416 (Nelson).

46. The Court also finds unpersuasive the evidence of "competitive price" records kept by employees of the Fuchs sugar broker. Spencer Fuchs, one of plaintiffs' witnesses, conceded that the price records kept by three of his employees occasionally revealed discrepancies among the prices reported by the three employees because "[t]here were price changes during the course of a day, or [the three employees] might have talked to ... different people [at the refinery]...." Tr. at 7335 (Fuchs).

47. Not only have plaintiffs failed to prove by a preponderance of the evidence the existence of a sugar price lower than list price generally available to industrial users upon inquiry prior to sale, they have also failed to show how such a price could be determined in future quarters.

48. Plaintiffs allege that the Company "knew" or "should have known" the effective selling price for every quarter because its officials were highly knowledgeable concerning pricing in the sugar market. *E.g.*, Tr. at 6716-17 (Nagle) ("The Company's sources of information very often might be better than [Amstar's] because they were buying from every cane refiner, every beet processor, in essence every seller in the marketplace. So ... they had a multiplicity of sources of information from the direct sellers as well as their relationship with all the general brokers in the industry who sought to service the Coca-Cola account."). Plaintiffs detail various ways that Company officials can and do receive information regarding selling prices of sugar. *See*

Plaintiffs' Proposed Findings of Fact and Conclusions of Law ¶¶ 1140-54 at 286-91 (Dkt. 897). However, the fact that Company officials might have access to information regarding transaction prices does not by itself demonstrate the existence of a method for determining under the unamended contracts a verifiable price upon inquiry prior to sale other than the refiners' list prices. The Court notes, for example, that the record is devoid of evidence of the Company's ability *in 1921* to obtain sugar price information other than its own costs and the list price.

49. Plaintiffs' witness William Nelson stated that he would have quoted Godchaux-Henderson's "daily competitive price" to the Elizabethtown plaintiff if asked for it. Tr. 6389-90 (Nelson). Yet there is no evidence on this record that Elizabethtown or any other plaintiff, in any quarter following the filing of this lawsuit, ever attempted to obtain Godchaux-Henderson's daily competitive price.

50. Nelson also stated that he did not make any inquiries of refiners at the request of plaintiffs to determine the price other than list price that was available upon inquiry prior to sale.

51. In preparing damages contentions for plaintiffs, Nelson utilized "reasonable prices." Tr. 6436-37; 6526 (Nelson). He does not say how he came to choose which prices were "reasonable" in any given quarter, much less how a "reasonable" price could be determined in future quarters.

52. Even for those quarters after the filing of this lawsuit, the prices used by Nelson in preparing plaintiffs' damages contentions with regard to Godchaux-Henderson's "market price" were not necessarily the prices appearing on the refiner's "daily" telexes. In explaining why he used a

price of $24.79 for January 5, 1982, Nelson stated: "That was an effective price that day.... That doesn't necessarily identify it as a daily competitive price. I determined that it was a price that was reasonable." Tr. 6526 (Nelson).

E. *The Company's Reliance on Willett & Gray and Its Use of List Price is not an Abrupt Change in Practice from its Course of Conduct Prior to 1969.*

53. In *Coke III* and again in *Coke IV*, Judge Schwartz found that the Company conducted an investigation into market price prior to 1969 and that its decision to rely on Willett & Gray constituted an abrupt change in practice. However, in his Pretrial Conference Order (Dkt. 849) in October 1988, Judge Schwartz allowed defendant to relitigate this finding at trial:

> 1. Defendant can offer evidence on the issue of whether there was in 1969 an "abrupt change" as discussed by the Court in its Opinion of August 8, 1986 [*Coke III*]....
>
> 2. Defendant can introduce evidence concerning its course of conduct both before and after 1969....

54. The Court finds that, prior to 1969, the Company did not undertake an independent investigation each and every quarter to inquire of the ten largest refiners the price of sugar on the first seven days of the quarter. Rather, the Company relied primarily on the list prices reported in Willett & Gray and other published price lists, making inquiries of the refiners *only* when Willett & Gray did not list prices for the first seven days of the quarter or when the Company noticed a discrepancy between the prices listed in Willett & Gray and those in other price lists. The following evidence supports this finding.

55. As early as 1924, the parent bottlers were aware that the Company used the prices listed in Willett & Gray to calculate the price of bottlers' syrup. In 1924, the price of sugar rose above 7 cents per pound for the first time since the Consent Decrees were entered. On January 2, 1924, Willett & Gray reported: "The easier raw conditions and the light demand for refined caused somewhat lower prices in refined sugar, Federal and Arbuckle quoting 8.70c, and *although the other refiners have thus far not changed their list price from 8.90c, there are some accepting business at 8.80c.*" DX195 (emphasis added). On the following day, Willett & Gray reported: "Refined continues unchanged, Federal and Arbuckle quoting 8.70c *with the other refiners' list at 8.90c, although most of the latter are selling at 8.80c.*" *Id.* (emphasis added).

56. On January 11, 1924, John Sibley, an attorney for the bottlers, wrote to Harold Hirsch, attorney for the Company, inquiring:

> It has been called to my attention by some of the local bottlers that sugar is being quoted at the Refineries generally at about 10 points higher than business is actually being accepted.
>
> I would be glad if you would look into this and advise me if you do not think that this should be taken into consideration in fixing the price of syrup during the next quarter, if my information is correct.

DX199.

57. Hirsch responded on January 12, 1924:

> I have your letter of the eleventh in re quoted prices from the refineries.

> Mr. Howard Candler has this question of price up with Mr. Rainwater at the present time for the quarter commencing January 1, 1924. I have not carefully reviewed the contract, but it just occurs to me that the suggestion possibly involves a change of the contract, and if that be so then our clients should take the matter up.

DX200.

58. The record contains no further correspondence on this subject in 1924, and there is no evidence that the syrup price was recalculated. In the quarters which followed, the Company continued to use the prices from Willett & Gray. Except for the correspondence quoted above, the bottlers registered no objection.

59. Consequently, as early as 1924—only three years after entry of the Consent Decrees—the bottlers were aware that the Company was using the prices listed in Willett & Gray even when the listed prices were higher than the prices at which sugar was actually being sold. The acquiescence of the bottlers and of their representatives who negotiated the Consent Decrees is evidence that the Consent Decrees contemplated use of published list prices to calculate the price of sugar even when the refiners were accepting business at prices lower than published list price.

60. As early as 1928, the Company relied primarily on the prices listed in publications such as Willett & Gray to calculate the price of bottlers syrup with the knowledge and consent of the parent bottlers. In 1927, the refiners formed a trade association called The Sugar Institute, and changed their method of publishing their list prices to the publication of three separate prices—a 30-day price guaranteed against decline; a 30-day price without guarantee; and a 7-day

shipment contract. Horace Garner, an assistant purchasing agent for the Company informed Hirsch (attorney for the Company) of this change on October 9, 1928, and recommended:

> We have used in the years past the published list price for shipment in thirty days, whether guaranteed against decline or not. Such guarantee was given only as trade conditions warranted it and was withdrawn from time to time.
>
> We have a well set precedent in using thirty days' contract price; we could not buy and take out in seven days sufficient sugar to make the bottlers syrup for a quarter; the uncertainty of the refiners continuing the seven day guaranteed price—all lead to me to believe that we should use the thirty day contract price.

PX748.

61. On October 10, 1928, Hirsch wrote to Frank Spurlock and John Sibley, attorneys for the Thomas and Whitehead-Lupton parent bottlers, informing them of the change. After quoting paragraph 7 of the Consent Decrees, Hirsch stated:

> Since the formation of what is known as the Sugar Institute, these prices *are published in the list* in a different way from the manner in which they were heretofore published. *The list price now publishes the following:*
>
> [explaining the new pricing]
>
> To make myself a little clearer, prior to the forming of the Sugar Institute only one price was published.

> Would you be good enough to give consideration to *the present method of publishing the prices* as it relates to [paragraph 7] from the contract of [our] ... respective clients. It occurs to me that possibly we could jointly advise our respective clients ... after we have conferred with each other as to our interpretation, considering the new situation.

DX226 (emphasis added). Hirsch was apparently suggesting the Consent Decrees and contracts might be amended to reflect the new published pricing scheme.

62. Charles Rainwater, writing for Sibley of the Whitehead-Lupton Company, informed Hirsch:

> As sugar is now below seven cents per pound, we [the Whitehead-Lupton parent bottler] are willing to adopt the suggestion outlined in your letter of October 31st; that is, in determining the price of sugar quarterly you can take either *quotation*, notifying us which *quotation* has been adopted. If, however, the price of sugar reaches seven cents per pound or over under either *quotation*, then the question as to the *quotation* which should be adopted under the terms of the contract shall be determined without prejudice to any of the parties.

PX754 (emphasis added). It is apparent that Rainwater's use of the term "quotation" refers to the list prices published by The Sugar Institute.

63. Spurlock similarly responded for the Thomas Company:

> The plan as suggested in the letter of The Coca-Cola Bottling Company [the Rainwater letter above] meets with the approval of Coca-Cola

> Bottling Company as it can not be seen under present circumstances that there is any reason for changing that paragraph in the permanent contract fixing the manner of determining from time to time the price of sugar.

PX755.

64. Neither Rainwater nor Spurlock quarreled with the use of a published price or suggested direct inquiries to the refineries. This exchange clearly demonstrates that the Company was relying on published prices with the knowledge *and consent* of the parent bottlers as early as 1928.

65. The very fact that all parties in 1928 agreed to the use of the prices published by the Sugar Institute supports the contention they intended to use list prices to calculate the syrup price. The Sugar Institute condemned as discriminatory pricing (unless openly practiced and uniformly employed) "[v]ariations from the *open and publicly announced prices and terms*, including ... [s]pecial allowances by way of discounts...." PX745 at HR0153-HR0154 (emphasis added).

66. Except for a brief period from 1924-1925, the price of sugar remained at or below seven cents per pound until 1947. On June 3, 1947, E.J. Forio an executive with the Company wrote DeSales Harrison, President of the Thomas Company, a letter outlining the procedure for determining the ten largest refineries and their quotations for sugar. He stated:

> For quotations, reliance is placed upon Willett & Gray, Inc., which has been for many years the universally recognized standard statistical service on sugar. In instances in which the publication dates of Willett & Gray do not conveniently coincide

> with the dates referred to in our contract, we obtain the necessary quotations directly from the refineries.

PX811. Forio's letter plainly states that the Company contacted the refineries to obtain sugar prices only when the publication dates of Willett & Gray did not coincide with the first seven days of the quarter.

67. Not only did the bottlers acquiesce in the procedure outlined in the Forio letter, they insisted that it be followed. On May 27, 1947, DeSales Harrison of the Thomas Company sent a letter to The Coca-Cola Company requesting that the Company advise the Thomas Company in the event it used any sugar quotations other than that quoted by the refineries as listed in Willett & Gray. Two subsequent letters, dated July 12, 1948 and October 15, 1957, from the Thomas Company to The Coca-Cola Company refer to and reaffirm the desire of the Thomas Company that The Coca-Cola Company continue to rely on the prices listed in Willett & Gray:

> We again refer to our letter of May 27, 1947, in which we asked that we be advised *should The Coca-Cola Company consider using any base for sugar quotations other than that quoted by the refineries as listed in the Willett and Gray Statistical Trade Journal.* In this way we will have the opportunity of discussing this matter thoroughly with you before any [price] notice is sent to us. We hope that you will not find it necessary to so advise us,.... [11]

PX826 (dated 10/15/57); *see also* PX996 at CX0227 (dated 7/12/48).

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[11] The remainder of the paragraph refers to the Company's position regarding the use of price quotations for sugar sold in cotton, as opposed to paper, bags. *See, e.g.*, DX283; DX284; DX852; DX864.

68. Plaintiffs primarily base their argument that the Company abruptly changed its procedure for obtaining the market price of sugar on a memorandum by C.W. Hodgson, a Vice-President with the Company, dated August 20, 1956. The memorandum, which for purposes of this litigation has become known as the "Hodgson Memorandum," memorialized a telephone conversation between Hodgson and DeSales Harrison, President of the Thomas Company. The Hodgson Memorandum was circulated to and initialed by numerous Company officials, some of whom testified in this litigation, and outlined the Company's procedure for determining the price of sugar upon which calculation of the price of bottlers syrup was based. Because of the importance placed upon it by the parties, the contents of the Hodgson Memorandum bear quoting in full:

> Following conversation in Mr. Forio's office regarding DeSales Harrison's letter to me dated July 20, 1956 having to do with the quotation of sugar prices as quoted by Willett & Gray Statistical Trade Journal, I called Mr. Harrison and made the following points:
>
> 1. With reference to Dee's letter of July 20, 1956 in which he raised the question on sugar quotations as given by Willett and Gray, that I had thoroughly investigated the matter with the Purchasing Department, with Mr. Oehlert and Mr. Forio as well as digging back into the files.
>
> 2. That as mentioned in Forio's letter of June 3, 1947, it was not always possible to follow the list prices given by Willett and Gray because of the fact the publication dates of Willett and Gray do not coincide with dates referred to in our contract.

3. That at times a refinery will sell below its own list price and that quoted by Willett and Gray. Under such circumstances the Purchasing Department has been using the lower price.

4. That I was convinced that where there was a possibility of two interpretations that the Thomas Company and the Bottler had in every instance benefitted.

5. That perhaps had it not been for the reorganizational changes, the matter would never have been brought up perhaps the best thing to do would be for the Company notification to continue to refer to the two quotations, paper and cloth, and for Dee to continue to write the same letter that he has in the past.

6. I advised him that since the entire matter had arisen due to Mr. Hunter's wish to be able to explain the method to Bottlers, that I thought that we were exactly where we were back in 1947 and that no basic change had been made in the understanding but merely changes in ownership of refineries and the occasional variance as mentioned heretofore in connection with the impossibility of hueing to the line 100% with Willett and Gray.

7. Dee asked if I wished to formalize the matter and I told him that I did not think it was necessary and he agreed.

8. Dee agreed with the foregoing and the file is closed as far as I am concerned.

PX825; DX307.

69. Plaintiffs point to paragraphs 3 and 4 of the Hodgson Memorandum as evidence that the Company con-

ducted its own independent investigation into the price of sugar for the first seven days of each and every quarter. However, paragraph 3 should not be read in isolation out of the context of the remainder of the memorandum. In paragraph 2, Hodgson refers to the letter of June 3, 1947 from S.J. Forio to DeSales Harrison, in which Forio informed Harrison that the Company relied primarily on the prices published in Willett & Gray. PX811; *see supra*. Neither paragraphs 3 and 4 nor the Hodgson Memorandum taken as a whole purports to overrule or to contradict the policy set forth in Forio's June 3, 1947 letter. Moreover, in paragraph 6 Hodgson appears to reaffirm the procedure outlined in the June 3, 1947 letter when he states: "I thought that we were exactly where we were back in 1947 and that no basic change had been made in the understanding...."

70. The testimony of Company officials who participated in calculating the price of bottlers' syrup confirms that in 1956 the Company relied primarily on the contents of Willett & Gray to determine the price of sugar for purposes of calculating syrup price. Their testimony also sheds light on the meaning of paragraph 3 and 4 of the Hodgson Memorandum. According to the testimony adduced at trial, the Company received, in addition to Willett & Gray, published sugar price quotations from brokers and published price lists from the refiners themselves. When discrepancies arose between the prices published in Willett & Gray and those contained in the brokers' reports and the refiners' price lists, the Company would contact the refiners for clarification. If, under these circumstances, the Company's inquiries resulted in a price lower than that published in Willett & Gray, the Company used the lower price in its syrup price calculations.

71. The deposition of John Mount, Assistant to the Director of Purchasing and later a Senior Buyer for the Company, who had responsibility for the day-to-day operations of the Sugar Section of the Purchasing Department until 1967-68, was read into the record. Mount gave the following testimony concerning the procedures for obtaining the price of sugar for purposes of calculating syrup price:

> Q: What was your responsibility for that process [collection of information to be used to calculate syrup price] beginning at the earliest stage in which you had any role in it?
>
> A: To obtain price information from price lists, from telegrams, from circulars, from what was then known as the bible of the industry, Willett and Gray and to summarize that information for the review of my superiors.

Tr. 5979 (Mount).

72. When asked whether he received particular instructions regarding the collection of sugar price data, Mount responded:

> All that my memory serves me is that the first line of reference is Willett and Gray....
>
> [There were no other instructions] that I recall, other than what I previously stated, to check other documentation to look to see if Willett and Gray was accurate in what they were reporting....
>
> [The "other documentation" consulted included] Brokers' letters, such as Lamborn's letter, Lamborn at that time being the largest refined sugar broker in the country, I believe. The Dyergram from B.W. Dyer & Company....

....

> [and] price lists as we may have received from various refiners ... and any changes in such price lists as may have been received in the form of a telegram or letter of advice.

Tr. 5980-81 (Mount).

73. Mount's initials appear on the Hodgson Memorandum, indicating that he reviewed the memorandum in 1956. *See* Tr. at 6088 (Mount). Mount explained paragraph 3 of the Hodgson Memorandum as referring to situations "[w]here there were deviations from price, announced to the trade and the purchasers which may not have been picked up and quoted in Willett & Gray. Such deviations as announced by the refiners would be used in determining the price. Those deviations were usually in the form of a telegram or wire." Tr. at 6098-99 (Mount).

74. The deposition of Donald Leslie was also read into the record. Leslie was an assistant purchasing agent with the Company in 1946. In 1957 he became Assistant Director of Purchasing, and he was Director of Purchasing from 1960-69. He testified the following with regard to the procedure used to determine the price of sugar for purposes of calculating syrup price:

> Q: For purposes of computing average market price of sugar to be used in pricing bottlers syrup, was it the procedure of the Purchasing Department ... to look not only to Willett and Gray but to Lamborn as well as presumably the refiners own published price lists?
>
> A: Correct.

Q: And if there were not differences between those three sources, then the price shown by those three sources would be used?

A: Correct.

Q: If there were differences, then ... Mr. Mount would make a phone call to a refinery?

A: Asking for clarification of those two quotes, two separate quotes.

Tr. 5879-80 (Leslie).

75. Leslie's initials appear on the Hodgson Memorandum. He testified that the memorandum was true and accurate when he received it. Tr. 5905 (Leslie).

76. Joe Power was a senior statistician in the Purchasing Department at the time the Hodgson Memorandum was written. He was the person within the Purchasing Department primarily responsible for actually collecting the data from which the price of sugar was determined. Tr. 5878 (Leslie). Power testified at trial and described the procedure for collecting the price of sugar as follows:

Q: Mr. Power, could you please describe for us the method that you used for collecting price quotations from cane sugar refiners for use in the bottler syrup price calculations beginning in [1954]?

A: Our primary source was always Willett and Gray. We always tried to have copies of everyone's price lists and price announcements so we could refer to those.

We always followed up by reading our publications. But they were merely supplemental. Willett and Gray was the primary reference.

Q: Now, in 1954, what was the primary source of price quotations that you used in the bottlers' syrup price calculations?

A: Willett and Gray.

Tr. 9462.

77. Power further testified:

Q: As part of your duties in the Purchasing Department, did you compare the prices that appeared in Willett and Gray and the price announcement that you received from the refiners?

A: Yes I did.

Q: Did the prices that appear in Willett and Gray always coincide exactly with the price announcements that you received from the refineries?

A: In the vast majority of the time they coincided exactly. When they didn't we would investigate to clear up any discrepancies.

Q: What would you do when you discovered a difference between the price announcements that you received from the refiners and the price that appeared in Willett and Gray?

A: The normal procedure would be to call the refiner to see if perhaps we had not received a price list or a price announcement.

Q: On those occasions where there was a difference in the prices that were reported in Willett and Gray and the prices that appeared on one of the refiner's price lists, which of those prices would you use in the bottlers' syrup calculation?

A: If the refiner said his price list was his correct price list, then we used that.

Q: Were there occasions when Willett and Gray did not report the specific quotations for a refiner?

A: That has happened, yes.

Q: What would you do on those occasions?

A: We normally would go to the refiner to get the quotations.

Tr. at 9468-69 (Power).

78. As an example, Power testified that in the third quarter of 1956, J. Ahrens & Company (Supreme) for the first time became one of the ten largest refiners. Consequently, the Company required a sugar price from that particular refiner for the first time. Because it had never before needed that refiner's sugar price, the Company did not have its price list, and it became necessary to telephone the refiner to get a price. Tr. 9475 (Power). *See also* DX859 at P004290 (intra-Company memorandum on sugar price for third quarter of 1956, citing telephone conversation with the refiner as a source of the price information).

79. Power's initials appear on the Hodgson Memorandum. He testified that the memorandum accurately described the method used for collecting prices from the refineries. As to paragraph 3, Power stated that the Company would have used a price lower than that published in Willett & Gray in the syrup price calculation when there was "an announced allowance that was available to everyone. There could be an instance where the refiner had put out an announcement, saying we are reducing our price or we are increasing our price, effective on a given date, and

[the Company] might have the announcement in hand, not the price list.... Anything that would openly, to the trade, change [the refiner's] price quotation, would cause us to use the new price quotation." Tr. 9570-71.

80. The testimony of Company officials that they primarily relied on the information published in Willett & Gray when calculating the price of bottler syrup during the mid-1950's is supported by certain intra-Company memoranda entered into the record. In a memorandum dated October 8, 1954, Homer Thompson informed Forio that the average market price of refined cane sugar for the first seven days of the fourth quarter of 1954 was 8.47 cents per pound in paper bags and 8.7078 cents in cotton bags. The memorandum listed the following under the heading "SOURCES":

> Willett & Gray's Daily Sugar Trade Journals for 10/1-4-5-6-7; *supplemented by the following:*
>
> (a) C & H's price list for industrial grade sugar on Pacific Coast.
> (b) Lamborn's Sugar Market Reports for Sept. 28, 1954 & Oct. 5, 1954.
> (c) Imperial's wire of Sept. 15, 1954.
> (d) Letter form American dated Sept. [unreadable], 1954, concerning price ... New Orleans (Gulf) area.
> (e) Keiser & Co., Inc.'s Sugar Market Review for period Sept. 30, 1954 to October 6, 1954.

DX852 at P004261 (emphasis added).

81. A similar memorandum, dated July 9, 1956—only one month prior to the Hodgson Memorandum—from Thompson to Hodgson giving the price for the first seven days of the third quarter of 1956 listed its sources as:

> Willett & Gray's daily Sugar Trade Journals for

7/2-3-5-6 *supplemented by the following:*

(a) C & H's price list for industrial grade sugar on Pacific Coast.
(b) Keiser & Co.'s Sugar Market Review for period June 28 to July 5.
(c) Willett & Gray's Weekly Sugar Trade Journal dated 7/5/56.
(d) Lamborn's Sugar Market Report for 7/3/56.
(e) Letter from American Sugar Refining Co. dated 4/24/56 concerning price in New Orleans.
(f) Telephone conversation on 7/6/56 with Mr. Charles A. Levy, Vice President, J. Aron & Co. (Supreme)—see notes attached.

DX859 at P004290 (emphasis added).

82. The Court finds that the Hodgson Memorandum does not support plaintiffs' assertion that the Company prior to 1969 conducted its own independent investigation into the price of sugar for the first seven days of each quarter. Rather, the Hodgson Memorandum is entirely consistent with the Company's procedure as described in the June 3, 1947 Forio letter. That is, the Court finds that the Hodgson Memorandum describes a procedure wherein the Company, when calculating the price of bottlers syrup pursuant to paragraphs 6 and 7 of the Consent Decrees and paragraph FOURTH of the unamended contracts, primarily relied upon the sugar prices published in Willett & Gray, supplemented by brokers' reports, such as Lamborn, and refiner's price lists. When Willett & Gray failed to publish prices for the first seven days of a quarter, or when a particular refiner's price as published in Willett & Gray differed from that listed in a broker's report or in the refiner's own price list, the Company contacted the refiner directly to resolve the dis-

crepancy. When the price given by the refiner in response to the Company's inquiry was lower than that published in Willett & Gray, the Company used the lower figure when calculating the syrup price.

83. This point is further buttressed by the fact that one of the Thomas Company's letters emphasizing its desire that the Company continue its procedure, as set forth in the Forio letter, of relying upon the prices quoted in Willett & Gray was written after the date of the Hodgson Memorandum and the telephone conversation between Hodgson and the Thomas Company official that the Memorandum memorialized. *See* PX826 and *supra*.

84. The Company's procedure remained essentially unchanged both before and after 1969, until Willett & Gray ceased publishing in 1979. *See* Tr. 9477 (Power) (primary source of sugar price information in January 1975 was still Willett & Gray); Tr. 9733-36 (Konzal) (no change in procedure from 1965-80). Thus, the Company's primary reliance on the prices published in Willett & Gray after 1969 does not constitute an abrupt deviation from its prior course of performance.

CONCLUSIONS OF LAW

85. The Court first addresses the Company's assertion that plaintiffs waived or are estopped from raising their claims with regard to market price. The concepts of waiver and estoppel, while sometimes used interchangeably, are distinguishable. "[A] waiver is a voluntary and intentional abandonment or relinquishment of a known right, whereas an equitable estoppel may arise though there was no intention on the part of the party to relinquish or change any existing right." 28 Am.Jur.2d *Estoppel and Waiver* § 30 at 633-34. The Company bears the burden of showing waiver or estoppel.

86. Waiver includes an element of intent. The Company has not shown a waiver because it has not shown that plaintiffs voluntarily and intentionally relinquished their asserted right to use of a price other than list price in the calculation of the syrup price. At most, the Company has shown that plaintiffs were negligent in failing to object to its use of the list price of sugar in its syrup price calculations.

87. The elements of equitable estoppel include a showing that the other party relied on the actions or omissions of the estopped party to his detriment. There has been no showing by the Company that it in any way changed its position as a result of plaintiffs' failure to object sooner to its use of list prices. *Matter of B.J. Thomas, Inc.*, 45 B.R. 91, 95-96 (Bankr.M.D.Fla.1984) (mere delay in enforcing one's rights does not create estoppel so long as the other party is not prejudiced). If anything, the Company has argued the exact opposite—that it has not changed its position with regard to the use of list prices to calculate the syrup price since the inception of the unamended contracts in 1921.

88. The Company has also failed to demonstrate that it has somehow been misled or prejudiced by plaintiffs' failure to act sooner. Under the facts of this case, the Company's argument that it has been prejudiced because required to defend an older claim is insufficient to sustain its assertion of waiver or estoppel. Having concluded that the plaintiffs did not waive and are not estopped from asserting that the Company's use of list prices to calculate the syrup price breached their contracts, the Court turns to the merits of plaintiffs' assertion.

89. The Court must give effect to the mutual intention of the parties at the time the Consent Decrees and unamended contracts were executed. In so doing, the Court concludes

that the pricing provisions of the Consent Decrees and unamended contracts were intended to operate prospectively and to govern the parties' future conduct.

90. The Court concludes that the term "market price" as it is used in the Consent Decrees and unamended contracts is ambiguous and that the use of "market price" as opposed to "list price" in the Consent Decrees and unamended contracts does not evidence the intention of the contracting parties in 1921 that the Company calculate the syrup price using a price, such as negotiated selling prices, other than list price.

91. The Court further concludes that the parties in 1920 and 1921 intended the pricing provisions to yield a syrup price which would be both competitive and verifiable.

92. The Court concludes that plaintiffs have not proven by a preponderance of the evidence that list price is a wholly fictitious price. At all times relevant to this litigation at least some sugar was sold to industrial users at list price.

93. The Court concludes the "list price," *i.e.*, the price published in the refiners' price lists and the trade publications, satisfies the terms and intent of the Consent Decrees and unamended contracts because it yields a syrup price which is competitive and verifiable.

94. The Court also concludes that the list price satisfies the definition of "market price," as that term is used in the pricing provisions of the Consent Decrees and unamended contracts, set out by Judge Schwartz in *Coke III* because the list price is a price available to industrial users upon inquiry prior to sale.

95. The Court concludes that plaintiffs have not proven by a preponderance of the evidence that there exists a price other than list price which satisfies both the intent of the

pricing provisions and Judge Schwartz' definition of "market price."

96. More importantly, beyond allegations that the Company knows or should know of such a price, plaintiffs have offered no evidence as to any method for prospectively determining a price lower than list price which is available to industrial users upon inquiry prior to sale. Judge Schwartz' definition of "market price," which plaintiffs chose to abide by when they declined the Court's offer to reconsider the rulings of *Coke III*,[12] calls for a price available upon inquiry prior to sale. Plaintiffs have offered no procedure for determining such a price in future quarters.

97. The Court concludes that the Company's reliance on the prices listed in Willett & Gray and other trade publications is not the result of an abrupt change in practice in 1969. Rather, the Court concludes that, as early as 1924, the Company, with the knowledge of the parent bottlers, relied upon prices listed in the trade journals. This course of performance close in time to the drafting of the Consent Decrees and unamended contracts is evidence that the contracting parties found acceptable the use of list prices in determining the price of syrup.

98. The plaintiffs have proven no more than that around 1969 the cane sugar refiners began to change the way they priced sugar for large industrial users. If in fact there has been a material change in the pricing practices of the cane refiners, it is up to the parties and not the Court to adjust their contractual relations to reflect such a change.

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[12] See Transcript of Conference Before Hon. Joseph J. Farnan, Jr. (Oct. 31, 1989) (Dkt. 882).

99. The Court concludes that the Company's reliance on list prices to calculate the syrup price does not constitute a breach of the pricing provisions of the unamended contracts, and plaintiffs, therefore, are not entitled to damages.

Coke III

Reported at 654 F. Supp. 1388

COCA-COLA BOTTLING COMPANY OF ELIZABETHTOWN, INC., et al., Plaintiffs,

v. The COCA-COLA COMPANY, Defendant.

Civ. A. No. 81-48 MMS.

United States District Court, D. Delaware.

Aug. 8, 1986.

MEMORANDUM OPINION

MURRAY M. SCHWARTZ, Chief Judge.

This class action for declaratory, injunctive, and monetary relief was brought against The Coca-Cola Company ("the Company") by Coca-Cola Bottling Company of Elizabethtown, Inc. on behalf of itself and other unamended first-line Coca-Cola bottlers in the United States.[1] By Order dated April 12, 1983 (Dkt. 155), 95 F.R.D. 168, as amended on April 27, 1983, 98 F.R.D. 254, (Dkt. 157), the Court certified two issues for determination and severed those issues for separate trial pursuant to Fed.R.Civ.P. 42(b). Those issues are: (1) the meaning of the term "sugar" as used in Paragraph 10 of two identical 1921 Consent Decrees, including whether the word "sugar" as used in that paragraph encompasses High Fructose Corn Syrup-55 ("HFCS-55"), and (2) the meaning of the term "market price" as used in paragraph 7 of those Decrees.

[1] Plaintiffs are known as "unamended bottlers" because they continue to operate under perpetual contracts, based upon 1921 Consent Decrees, rather than under a 1978 Amendment which other Coca-Cola bottlers ("amended bottlers") have executed.

Paragraph 10 of the Consent Decrees provides:

> The party of the second part [The Coca-Cola Company] contracts that the syrup sold and furnished by it to the party of the first part [the parent bottler] is to be high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty two one-hundredths (5.32) pounds of sugar to each gallon of syrup.

Paragraph 7 of the Consent Decrees reads:

> It is agreed between the parties that the price of sugar is to be determined quarterly, January, April, July and October in each year, by averaging the market price of standard granulated sugar during the first week in such quarter, as quoted at the refineries by the ten refineries operating in the United States of America at the time, having the largest capacity and output.[2]

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[2] Other relevant provisions of the Consent Decrees are paragraphs 5 and 6:

> 5. The parties hereto hereby raise the contract price of Coca-Cola Bottlers Syrup as fixed by said existing contract to one dollar and seventeen and a half cents ($1.17 1/2) per gallon delivered as heretofore, including five cents (5¢) per gallon for advertising matter to be delivered at actual cost and freight expenses, and said party of the first part is hereby relieved and discharged from any and all obligations to spend anything for advertising; but it shall be bound to sell and deliver, at such actual cost, the same amount of advertising matter delivered to it by the party of the second part, to the actual Bottlers, as herein provided for. The party of the first part furthermore agrees to pay an additional six cents (6¢) per gallon for such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per pound, and on the same basis for a fractional advance; same to include all possible increases in the cost of producing such syrup by the party of the second part other than may arise under, and as provided for by the arbitration clauses herein.

PX 4; PX 5.

Since January, 1980, the Company has sweetened CocaCola with High Fructose Corn Syrup-55 ("HFCS-55").[3] Plaintiffs assert the term "sugar" as used in the Decrees means refined granulated sugar, i.e., sucrose. They contend that HFCS-55 is not "sugar" as that term is used in the 1921 Consent Decrees and that the Company is violating Paragraph 10 of those Decrees by using HFCS-55 in Coca-Cola Bottlers Syrup without their consent. The Coca-Cola Company argues "sugar" as used in paragraph 10 is a generic name for a family of complex carbohydrates which includes not only sucrose, but also fructose and glucose. Based on this interpretation, 1391 the Company insists it has the right to use HFCS-55 in Cola-Cola Bottlers Syrup without the bottlers' consent.

The second issue in dispute between the unamended bottlers and The Cola-Cola Company involves the meaning

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6. In order to promote the sale of Coca-Cola and enable the actual bottlers to compete with other beverages, the party of the first part hereby agrees to sell such syrup to the bottlers purchasing from it at not exceeding one dollar and thirty cents ($1.30) per gallon, including five cents (5¢) per gallon for advertising matter to be delivered, and an additional six cents (6¢) per gallon for such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per pound, and on the same basis for a fractional advance; the party of the first part hereby further agrees that any increase in price or change in terms growing out of any agreement or arbitration as provided under paragraph three hereof shall not be exceeded or increased by it in any sales it may make of said syrup to the bottlers purchasing the same from it.

PX 4; PX 5.

3 High Fructose Corn Syrup is a clear, sweet viscous liquid produced from cornstarch and composed of fructose, glucose, and oligosaccharides. Tr. 360-69 (Sequira). HFCS-55 contains 55% fructose. *Id.* at 369. The substitution of HFCS-55 for sucrose does not adversely affect the quality of the Coca-Cola product. Tr. 3218-19 (Schmidt); DX 592.

of the term "market price" of sugar as used in paragraph 7 of the 1921 Consent Decrees. Plaintiffs contend for purposes of paragraph 7 that market price is the average of the actual selling prices of the basis grade of refined granulated sugar being charged f.o.b. the ten largest refineries in the United States on sugar sold in wholesale lots for prompt shipment to industrial users during the first seven days of each calendar quarter, after the deduction of any rebates, discounts, or allowances (other than a two percent cash discount).

Defendant counters "market price" means the publicly quoted or "list" prices announced by refiners to the entire trade prior to sale before any rebates, discounts, or allowances are negotiated by an individual purchaser. The Company has not restricted its definition to only those prices reflected on a published list; it has instead used the term more broadly to include those prices publicly quoted to the trade at large prior to sale, *i.e.*, the price that would be published in a price list if the refiner issued a current price list at that given moment.

The certified issues were tried by the Court between May 19 and June 13, 1986, without a jury, generating over 3400 pages of trial transcript. Testimony was given by fourteen witnesses, either through live testimony or by deposition. During the course of the trial plaintiffs tendered one thousand and forty-nine documentary exhibits; the Company tendered six hundred and forty-nine.[4]

The Court concludes: (1) "sugar" for purposes of paragraph 10 means refined granulated sugar from cane or beet,

4. The trial did not include consideration of issues and defenses peculiar to individual bottlers nor construction of the actual bottlers' contracts (as opposed to the Decrees). Discovery and trial of these matters were stayed pursuant to an Order of April 12, 1983. (Dkt. 155).

and therefore HFCS-55 is not sugar as that term is used in paragraph 10 of the 1921 Consent Decrees, and (2) for purposes of paragraph 7 the "market price" of sugar means an average of the price per pound for refined granulated sugar of the grade and in the packaging unit in which it is principally sold to industrial users f.o.b. the refinery, as made known to such industrial users upon inquiry prior to sale by the ten refineries in the United States with the largest capacity and output during the first seven days of each calendar quarter, less any discounts, allowances, or rebates from that price which are available to industrial users or are made known to them upon inquiry prior to sale, but not including a standard two percent cash discount or any individually negotiated discounts, allowances, or rebates.

I. *Background Facts*

Much of the historical background of the contractual relationship between The Coca-Cola Company and the bottlers of Coca-Cola is summarized in the 1920 opinion of the Court, *Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 269 Fed. 796 (D.Del.1920), and in other opinions of this Court, *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. The Coca-Cola Co.*, 95 F.R.D. 168 (D.Del.1982); *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. The Coca-Cola Company*, 98 F.R.D. 254 (D.Del.1983). Some of that background is repeated here because it aids in understanding the resolution of the present controversy.

In 1892 The Coca-Cola Company was formed to market fountain syrup. Dkt. 334 (Pretrial Order, Admitted Facts) ¶ 6 (hereinafter "Admitted Facts P ——"). The Coca-Cola bottling system began in 1899. On July 21 of that year Asa Candler, then president of The Coca-Cola Company, executed on behalf of The Coca-Cola Company a contract granting

B.F. Thomas and J.B. Whitehead the exclusive right to engage in the business of bottling and selling Coca-Cola throughout all but eight of the United States. The contract obligated the Company to sell Thomas and Whitehead their requirements of Coca-Cola syrup at a fixed price. Admitted Facts ¶¶ 9, 10, 11, 12.

In 1900 Thomas and Whitehead divided the territory between them. Admitted Facts ¶ 16. Thomas named his bottling company "Coca-Cola Bottling Company" ("the Thomas Company"). Admitted Facts ¶ 18. Whitehead and his new partner J.T. Lupton entitled their bottling company *"The* Coca-Cola Bottling Company" ("the Whitehead-Lupton Company"). Admitted Facts ¶¶ 17, 19. These two companies became the primary "parent" bottlers.

The two companies developed their respective geographic areas independently. They each contracted with local businessmen ("actual bottlers" or "first-line bottlers") who built bottling plants, developed the market for bottled Coca-Cola, and sold Coca-Cola to customers in their exclusive territory. Admitted Facts PP 16-20, 24. The Thomas Company granted to its actual bottlers term contracts for two years, Admitted Facts P 26; the Whitehead-Lupton Company granted contracts with no time limitation. Admitted Facts P 105. In 1920 there were more than 300 bottlers in the Thomas Territory, Admitted Facts P 26, and approximately 800 in the original Whitehead-Lupton territory. Admitted Facts P 25. The parents neither manufactured or transported the syrup nor bottled the final product, *The Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 269 Fed. at 801, 811-12; Admitted Facts P 23; that was exclusively left to the actual bottlers.

Under the terms of the parent bottlers' contract, the Company agreed to sell the parents their requirements of

Coca-Cola Bottlers Syrup at a fixed price. The agreement also required that the "Coca-Cola syrup ... be used in proportions of not less than one ounce of syrup to eight ounces of water." Admitted Facts ¶ 12.

Refined granulated sugar was the principal and most expensive ingredient used in the manufacture of Coca-Cola syrup. PX 766 (AZ0605, AZ0609, AZ0610, AZ0611). The price of sugar had been in the range of 4.9 cents in 1899 when the contract was originally executed and 4.65 cents in 1907 when the fixed price of syrup had last been amended. PX 312. World War I severely affected the price and supply of sugar. Only the imposition of rigid price controls held the price of refined sugar at 9 cents per pound. Admitted Facts ¶ 50. After termination of federal price controls of sugar in September 1919, prices rose rapidly until they exceeded 23 cents per pound in May-June 1920. Admitted Facts ¶ 55.

During the war years, sugar purchasers were assigned quotas under which they were allowed to buy only 50 percent of their sugar purchases made during a previous base period. Admitted Facts ¶ 49. The Company responded by reducing the quantity of sugar used to sweeten Coca-Cola Bottlers Syrup, and by using sweeteners other than cane sugar. Admitted Facts ¶ 53.

In addition to reducing the quantity of its most expensive ingredient in Coca- Cola Bottlers Syrup, the Company sought price relief from the parent bottlers. In 1917 the parent bottlers voluntarily agreed to a temporary increase in the price of syrup to 97 cents per gallon because of the increase in the cost of sugar caused by the war. Admitted Facts ¶ 52.

In November 1919, at the request of The Coca-Cola Company, the parent bottlers again agreed to a temporary price increase. Under this temporary agreement, which was

to expire in February 1920, the parent bottlers agreed to pay the additional costs of manufacture for sugar purchased above 9 cents per pound, up to a maximum syrup price of $1.45 per gallon. At the Company's request, this temporary agreement was extended until March 1, 1920. Admitted Facts ¶¶ 56, 62. This agreement represented the first time the parties established a fluctuating price of syrup based upon the actual cost of any ingredient.

Early 1920 witnessed the virtual disintegration of the previous harmonious relationship between The Coca-Cola Company and the parent bottlers. In its stead there developed a business relationship characterized by animosity, distrust, and hostility.

In January 1920, sobered by the inflation during World War I and its aftermath, The Coca-Cola Company sought to relieve itself of the basic fixed- price contract with the parent bottlers, under which it was operating but for the temporary amendments. It proposed a fluctuating price tied to the total cost of production of Coca-Cola Bottlers Syrup. Admitted Facts ¶ 58; DX 47; PX 309; PX 1 (*Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 269 Fed. 796 (D.Del.1920), Transcript of Record at 2215-19 (hereinafter cited as "R. ——")). The parents cancelled a scheduled meeting on the Company's 1920 proposal, stating they would not negotiate an amendment without definite, specific information as to the cost of manufacture. They conditioned the making of a counterproposal upon The Coca-Cola Company's willingness to furnish a statement of the cost per gallon of manufacturing the syrup, so itemized that the parents could verify its correctness. Admitted Facts ¶ 59; DX 57.

The Company responded by announcing that it regarded the parents' contracts as terminable at will. Admitted

Facts ¶ 60; PX 1 (R.2858). Further discussions floundered over the accuracy of the cost information provided by the Company's accountants. Admitted Facts ¶¶ 59, 61; DX 55; DX 58.

The parties eventually agreed to extend the temporary amendment, which provided for a pass-through of actual sugar costs above 9 cents per pound, while their representatives conducted negotiations. Admitted Facts ¶ 62; DX 59; PX 1 (R.1097-98). On February 11, 1920, the representatives submitted a joint report to the Company and to the parent bottlers. Their recommendation was as follows: the Company would acknowledge the contracts with the parent bottlers were perpetual; there would be a base price for syrup which would be priced according to the actual total cost incurred in manufacturing the syrup plus equal profits for the Company and the bottlers; and the bottlers' desire for verification would be served by placing the proportions of the various ingredients in a sealed envelope to be left with a representative of the parent bottlers and to be opened in the case of a dispute. Admitted Facts ¶ 63; DX 64.

Although the parents were willing to accept the proposal, Admitted Facts ¶ 64, the Company rejected it, asserting: (a) the base price stipulated in the proposal was too low; (b) the profit to the parents was too great; and (c) the Company should not have to disclose the proportions of the ingredients in the formula for Coca-Cola. Admitted Facts ¶ 65; DX 66. The Company countered with its own proposal of reduced profits for the parents and a straight adjustment for variations in the total cost of manufacture of syrup. As for verification, the Company agreed only to produce an audited statement from its accountants, stating that "the integrity and good faith of The Coca-Cola Company must be relied upon...." Admitted Facts ¶ 65; PX 1 (R.1579); DX 66.

Thereafter the Company rejected a parent's proposal that it acknowledge the perpetuity of the parents' contracts and withdraw its threats to terminate the contracts at will, PX 1 (R.72), in exchange for an extension of the 1919 temporary amendment. The parent bottlers responded on February 27, 1920 by notifying the Company that all negotiations were terminated, and that all temporary arrangements were cancelled as of March 1, 1920. After that date the parent bottlers demanded the Company carry out all aspects of its permanent fixed-price contracts with the parent bottlers, which were based on the 1907 price of sugar. Admitted Facts ¶ 66.

After notifying the bottlers on March 2, 1920 that their contracts "will stand terminated on May 1, 1920," Admitted Facts ¶ 67; PX 343; PX 344, the Company on April 1, 1920 submitted a final settlement proposal. The Company offered to appoint the parents as agents and distributors, entitled to a royalty on each gallon distributed. Again the Company proposed a cost-plus arrangement, with the price to be adjusted semi-annually based on a sworn statement from the Treasurer of the Company itemizing specific elements of the Company's costs. Admitted Facts ¶ 69; DX 67. The parents rejected this offer. Admitted Facts ¶ 70; PX 368; PX 369.

Faced with contract termination, on April 13, 1920, the two principal parent bottlers filed suit in Georgia state court seeking to enjoin the Company from terminating their contracts. Admitted Facts ¶ 72. Six actual bottlers intervened as plaintiffs. Admitted Facts ¶ 74. The Georgia suits were voluntarily dismissed on May 30, 1920, and were refiled on June 1, 1920, in the United States District Court in Delaware. *Coca-Cola Bottling Co., v. The Coca-Cola Co.*, D.Del. Case No. 388, PX 1 (R.5); *The Coca-Cola Bottling Co., v. The Coca-Cola Co.*, D.Del. Case No. 389. PX 1 (R.5). The same first-line bottlers who had

intervened in the Georgia cases intervened in the cases in this Court. PX 1 (R.80, 93).

On June 10, 1920, the parties to the Delaware litigation agreed to entry of an order requiring the Company to supply the parent bottlers' and actual bottlers' requirements of Coca-Cola Bottlers Syrup during the pendency of the litigation. Under the terms of the Order, the price of the syrup paid by the actual bottlers to the parent bottlers was fixed at $1.72 per gallon for 5 months (until November 1, 1920), by which time it was anticipated a final decision on the applications for interlocutory injunctions would have been rendered. The Order further provided that if the final decision had not issued by November 1, 1920, the syrup price would be increased or decreased from the $1.72 level based upon increases or decreases in the Company's actual costs of manufacture of the syrup. Admitted Facts ¶ 77.

During the negotiations leading to the June 10 Order, it appears the Company failed to disclose fully that it had entered into substantial long-term sugar contracts at prices near the top of the market. The bottlers were given to understand, from representations made in an affidavit filed on June 7, 1920 by Charles H. Candler, then Chairman of the Board of The Coca-Cola Company, that the Company had favorable long-term sugar contracts "very much lower than the present market price." PX 1 (R.1608). Charles Rainwater, in a letter to Candler dated January 14, 1921, recollected Candler's statements to the bottlers:

> [Y]ou represented that The Coca-Cola Company had but one written contract, which expired in about three weeks, and one verbal contract, under which the market price each Monday morning was controlling.

DX 105. *See also* DX 81 (Letter from J.B. Sizer, attorney for actual bottlers, to Crawford Johnson, Vice-President, Coca-Cola Bottlers' Ass'n (Oct. 18, 1920)) (summarizing bottlers' discussions leading to entry of June 10 Order); DX 87 (Letter from J.B. Sizer to Carl Rainwater, Secretary and Treasurer, Whitehead-Lupton Co. (Nov. 1, 1910)).

Although the price of sugar dropped steadily from its peak in June, 1920, PX 311, *see* PX 449, the price of syrup to the parent and actual bottlers under the June 10, 1920 Order remained fixed. Thus, while competing soft-drink prices fell, PX 457, PX 461, PX 462, PX 520, PX 530, PX 557, the retail price of Coca- Cola remained high. PX 457, PX 485. Actual bottlers suffered a loss in sales volume. PX 457; PX 520; PX 530. The Chairman of The Coca-Cola Company reported that the Company's total sales volume of syrup (which included both bottle and fountain syrup) declined 53% in September, 1920 and 50% in October, 1920, because of the high price of syrup. PX 485; Admitted Facts ¶ 81.

The bottlers expected relief on November 1, based on their understanding of the Company's sugar contracts. Instead, with the market price of sugar continuing to fall, PX 311, PX 556, the Company announced a price increase for its syrup in November, 1920, Admitted Facts ¶ 80; PX 470, in order to recoup the cost of its inventories of high-priced sugar. *See* PX 517; PX 542; PX 573. The Company also announced price increases in December, 1920, DX 95, and January, 1921. Admitted Facts ¶ 87; DX 107; DX 108; DX 110. The bottlers by agreeing in the June 10 Order to a price for syrup based upon the Company's total manufacturing cost quickly discovered they had unwittingly exposed themselves to and insulated the Company from the hazards of the marketplace. The Company required the bottlers to pay for the

Company's poor judgment in overpurchasing high-priced sugar, while it continued to receive fixed profits per gallon of syrup. Both The Coca-Cola Company and especially the actual bottlers found themselves in a precarious economic position while maintaining an increasingly antagonistic negotiating posture.

The Company represented its costs of manufacture under the June 10 Order had increased because of long-term sugar contracts at high prices. The parent bottlers, in disbelief, demanded verification of the Company's figures. Admitted Facts ¶ 88. The bottlers' audit revealed discrepancies, *see* DX 105, and the Company and the parent bottlers were unable to reconcile their figures or even agree on items of overhead to be included in the cost calculation. DX 111. When the Company in January 1921 announced an estimated February cost of manufacture of $1.85, DX 112, the bottlers took new action. In February, a parent bottler and actual bottlers filed supplemental complaints accusing the Company of fraud in the negotiation of and operation under the Order and sought appointment of a special master to determine the syrup cost under the terms of the Order. Admitted Facts ¶ 93.

Prior to the filing of their Supplemental Complaint, the bottlers' litigation and bargaining posture had been strengthened. On November 8, 1920, the District Court granted the parent bottlers' motions for preliminary injunctions and enjoined The Coca-Cola Company from terminating the 1899 contract with the parent bottlers. *Coca-Cola Bottling Co., v. The Coca-Cola Co.*, 269 Fed. 796 (D.Del.1920). The Coca-Cola Company appealed this ruling to the United States Court of Appeals for the Third Circuit. Admitted Facts ¶ 82. Although there would be no ruling because the parties were destined to settle, it was the bottlers' perception that the argument went very well for them. PX 601.

Beginning in November 1920, settlement negotiations ensued. Admitted Facts ¶ 83. On June 24, 1921, the Company and the parent bottlers executed a Memorandum of Settlement. Admitted Facts ¶ 96. During July, 1921, The Coca- Cola Company entered into settlement agreements with the parent bottlers. These agreements were entered as Final Decrees of the United States District Court in Delaware in Case Nos. 388 and 389 on October 4, 1921. PX 4; PX 5; Admitted Facts ¶ 97.

Between 1923 and 1975 the Company acquired all parent bottlers and assumed their rights and obligations to the actual bottlers. Among the rights assumed was the Thomas Company's right to participate with the Company in the fixing of the market price of sugar. PX 33; PX 779 ¶ Fourth (d). Admitted Facts ¶ 111; *see also Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 98 F.R.D. 254, 261 (D.Del.1983).

In the late 1970s, more than five decades after the 1921 litigation was settled, the Company sought price relief from the pricing provisions of its bottling contracts with the actual bottlers, which were based on the 1921 Decrees. The Company commenced negotiations for amendments that would permit more flexible pricing in its contracts with all actual bottlers by partially severing the link between the price of syrup and the price of sugar. DX 492. The Amendment as eventually drafted created a new formula for pricing syrup using a "Sugar Element," a "Base Element," and the Consumer Price Index. PX 880; Tr. 2035-36, 2040-42 (Blanchard). The 1978 Amendment also contained a provision that in the event the Company modified the formula of Coca-Cola Bottlers Syrup to replace sugar with "another sweetening ingredient," the resulting savings would be passed through to amending bottlers. PX 880 ¶ 1(c).

The vast majority of bottlers signed the Amendment. The 42 actual bottlers identified as plaintiff-intervenors at the time of trial of this matter all declined to amend their contracts. Complaint ¶ 35. These unamended bottlers have continued to operate under bottlers' contracts essentially unchanged (for purposes of this litigation) from the agreements reached in 1921. Complaint ¶ 32; *see* 98 F.R.D. at 261.

In January, 1980, the Company announced it would sweeten Coca-Cola Bottlers Syrup with a mixture of 50 percent HFCS-55 and 50 percent sucrose, PX 909, and eventually 100 percent HFCS-55. Syrup sweetened in this manner was sold thereafter to all bottlers, including unamended bottlers. PX 906; PX 903.

The Company continues to price Bottlers Syrup to unamended bottlers in what it argues is full compliance with Paragraph 7 of the unamended contracts and the 1921 Consent Decrees, using the prices quoted by refiners for granulated cane sugar by the eight largest cane refineries during the first seven days of each calendar quarter. Tr. 2755-58 (Konzal).[5] The Company prices Bottlers Syrup to amended bottlers in accord with the amended contract, passing through the savings achieved by the use of HFCS-55. Tr. 2110-27 (Blanchard); 3239-45, 3278 (Schmidt). Even with those savings, amended bottlers have paid more for their syrup than non-amenders in each quarter since the Amendment became effective because of the revised price formula. Tr. 3228-3262 (Schmidt); DX 646; DX 647; DX 649.

Plaintiffs filed this litigation in February, 1981, within one year of the Company's refusal to comply with the bot-

[5] The Company uses eight cane refiners, instead of the ten called for by paragraph 7, *see supra* p. 1390, because there are now only eight cane refiners operating in the United States. Tr. 2755-58 (Konzal).

tlers' demands that the Company either comply with paragraph 10 of the 1921 Consent Decrees by supplying the unamended bottlers with Coca-Cola Bottlers Syrup that contains not less than 5.32 pounds of sugar or pass on the savings from its use of high fructose corn syrup as a sugar substitute.

II. *Governing Law*

A. *Standing*

The Coca-Cola Company has raised a threshold issue of whether the bottlers have standing to enforce the 1921 Consent Decrees. This issue does not touch upon the question of constitutional standing, *see Allen v. Wright*, 468 U.S. 737, 750-51, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) (doctrine of standing derives from Article III requirement that federal courts may adjudicate only actual "cases" and "controversies"), but is here interposed in the nature of a contractual defense. The 26 bottlers in the former Whitehead-Lupton territories claim standing to enforce the Consent Decrees as members of the class of intervening bottlers in the 1920 litigation. The 18 bottlers in the former Thomas territories assert standing because their interests were represented by the intervening bottlers, whose litigation fees they helped pay. All of the plaintiffs also claim standing as third-party beneficiaries of the 1921 Consent Decrees.

Defendant disputes the third-party-beneficiaries argument, and further contends the Thomas bottlers have no standing to challenge the determination of "market price" because their contracts contain an express provision reserving determination of market price to the Company and the Thomas Company (which was acquired by the Company in 1975). PX 33 ¶ Fourth (d); PX 779 ¶ Fourth (d) ("the fixing of that market price shall be as determined by the party of the first part [the Thomas Company] and The Coco-Cola Company").

None of these standing issues should be addressed at this time, for the question before the Court is the proper interpretation of certain terms found in the Consent Decrees. The issues of breach and damages with respect to the individual contracts have been severed for separate discovery and trial. The question of each plaintiff's ability to sue for enforcement of their rights is properly reserved until the individual contracts are at issue.

B. *Law Applicable to the Construction of Consent Decrees*

[1] The litigants are in virtual agreement on the general principles of law governing interpretation of consent decrees. Consent decrees have attributes of both judgments and contracts.

> While they are arrived at by negotiations between the parties ..., they are motivated by threatened or pending litigation and must be approved by the court.... Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.

United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 n. 10, 95 S.Ct. 926, 934 n. 10, 43 L.Ed.2d 148 (1975). The Supreme Court has summarized the legal principles governing the interpretation of consent decrees:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. Such

> reliance does not in any way depart from the "four corners" rule of *[United States v.] Armour [& Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971)].

The most fundamental principle of contract construction is to ascertain the intent of the parties. *See, e.g., Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 269 Fed. at 804. A court should consider the agreement as a whole, putting itself in the position of the parties. *Radio Corp. of Am. v. Philadelphia Storage Battery Co.*, 23 Del.Ch. 289, 6 A.2d 329, 334 (1939).[6] The first task is to look at the express terms of the contract itself. *Restatement (Second) of Contracts* § 203(b) (1981); *see also United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971) (scope of consent decree to be discerned from "four corners" of document). A court may also look to other indicia of the parties' intent. These include the circumstances surrounding the making of the contract, the purpose of the parties, the course of performance under the contract, and trade usage. *Restatement (Second) of Contracts* § 202(1), (4). In applying these principles, a court must guard against inadvertently reforming a contract "under the guise of construction" by "looking too intently for means of bringing about some ultimate good, thwarting an apparent wrong, or preventing hardship...." *Coca-Cola*, 269 Fed. at 805.

The parties are presumed to have used words according to their ordinary or "generally prevailing meaning," although "technical terms and words of art are given their

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[6] The Court has held previously that claims arising directly from the 1921 Consent Decrees would appear to be governed by Delaware law. *Coca- Cola*, 98 F.R.D. at 269 & n. 35. The principles of law applied here, however, are certainly not unique to Delaware.

technical meaning when used in transactions within their technical field." *Id.* § 202(3). In determining intent, a court is to give course of performance greater weight than prior course of dealing, and prior course of dealing greater weight than trade usage. *Id.* § 203(b).

Cognizant both of these rules of construction and of the antagonistic course of dealing which preceded the 1921 Consent Decrees, attention is now turned to ascertaining the meaning of "sugar" as used in paragraph 10 of the Consent Decrees and the meaning of "market price" as used in paragraph 7.

III. *The Meaning of "Sugar" in Paragraph 10*

Paragraph 10 of the 1921 Consent Decrees reads as follows:

> 10. The party of the second part [the Company] contracts that the syrup sold and furnished by it to the party of the first part [the Parents] is to be high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup.

PX 4; PX 5. At issue is the meaning of the term "sugar" as used in paragraph 10, and whether that definition includes HFCS-55. Dkt. 155 (Apr. 12, 1983 Order) (certifying issues).

Plaintiffs contend "sugar" as used in paragraph 10 means refined granulated sugar (sucrose). Dkt. 364 ¶ 261. HFCS-55 lies outside that definition. Defendant argues the term means any sugar of the generic class of sweet carbohydrates that meets the Company's high quality standards. Dkt. 362, at 3. Under that definition, HFCS-55 is "sugar."

The conflicting theories of each party are sufficiently plausible to require the Court to look beyond the face of the Consent Decrees. Having examined the text of the Consent Decrees, usage of the term "sugar" by the parties and in general commerce when the settlement was signed, the context of the settlement, the implicit purposes of the parties in paragraph 10, and post-settlement usage and course of performance, the Court finds the term "sugar" in paragraph 10 means refined granulated sucrose from cane or beets and does not include HFCS- 55.

A. *The Face of the Consent Decree*

The starting point in interpreting a contractual provision must be the face of the document itself. Although the term "sugar" is not explicitly defined in paragraph 10, the application of basic rules of construction to the face of the Consent Decrees strongly suggests that the term as used there means refined sugar from cane.

A contract should be interpreted as a whole. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 269 Fed. 796, 805 (D.Del.1920); *Restatement (Second) of Contracts* § 202(2) (1981). Words used in one sense in one part of a contract are presumed to have been used in the same sense in another part of the same document. *Radio Corp. of Am. v. Philadelphia Storage Battery Co.*, 23 Del.Ch. 289, 6 A.2d 329, 334 (1939); *Wyckoff v. Garrison*, 43 Del.Ch. 465, 237 A.2d 139, 142 (1967).

In the Consent Decrees, the term "sugar" is used without modification four times: once each in paragraphs 5, 6, 7, and 10. The more explicit phrase "standard granulated sugar" also appears in paragraph 7.[7] References in paragraph

[7] The Court finds the parties did not intend by using this phrase to limit the Company to the use of any particular grade of granulated sugar. The Company purchased various grades of granulated cane sugar, but

7 to the market price of sugar at the ten largest "refineries" suggest the parties meant "refined granulated cane sugar" when they used the word "sugar." See Tr. 734-35 (Mount) (cane sugar refined at "refineries"), 2933 (Mount) (beet sugar refined by "processors"); Tr. 2794-96 (Konzal) (cane refinery; beet processing plant). There is no question the meaning of "sugar" in paragraphs 5, 6, and 7 is consistent. In claiming "sugar" in paragraph 10 has a much broader meaning, the Company must rebut the common-sense presumption that the same word in the same document means the same thing.[8]

B. *Commercial Meaning of "Sugar" Before Settlement*

A presumption also exists that parties to a contract used words according to their ordinary meaning. *See ITT Continental*, 420 U.S. at 234-35, 95 S.Ct. at 933 (citing United *States v. Armour & Co.*, 402 U.S. 673, 678, 91 S.Ct. 1752, 1755,

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primarily "fine granulated," both before and after entry of the 1921 Consent Decrees, *see* DX 7;DX 26; DX 46; DX 48; DX 51; DX 165; DX 237-40; DX 255; DX 385-86; DX 389; PX 117. The sugar refining industry did not then have definite standards for each grade, however. DX 251-54. Thus the Company has purchased "fine granulated," "standard fine granulated," and "standard granulated" sugar refined to its own specifications. *See, e.g.*, DX 237-40; DX 254; DX 255; DX 385-86; DX 388-89; DX 410; DX 411; DX 416; DX 418; DX 424; DX 551; DX 589; PX 711, at 45 (C.H. Candler autobiographical manuscript) ("We accordingly began the use of a standard granulated sugar which has been the grade of sugar employed in manufacturing Coca-Cola ever since"); Tr. 745 (Mount). *See also* PX 830, at 2 (internal Company memorandum) (construing "standard granulated sugar" in 1921 settlement agreement as "the granulated sugar (fine granulated, extra-fine granulated, etc.) designated by the refiner as his standard base product in 1921, which carried the basis price."); PX 983.

[8] Even if paragraph 10 is "unrelated" to paragraphs 5, 6, and 7, *see infra* pp. 1401-03, defendant must demonstrate the parties intended a different meaning for "sugar" in paragraph 10. The mere interpolation of paragraphs 8 and 9, dealing with trademark issues not directly related to paragraphs 5, 6, 7, or 10 and not mentioning "sugar," does not rebut the presumption.

29 L.Ed.2d 256 (1971) (language "taken in its natural sense"); *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23, 79 S.Ct. 944, 946, 3 L.Ed.2d 1054 (1959) ("normal meaning"); *Hughes v. United States*, 342 U.S. 353, 356, 72 S.Ct. 306, 307, 96 L.Ed. 394 (1952) ("wording would make most persons believe")). *Restatement (Second) of Contracts* § 202(3)(a). The "ordinary meaning" of a word may differ, however, according to the context. Technical terms and words of art must be interpreted according to their usage in a trade when used among parties in that trade. *Radio Corp.*, 6 A.2d at 334; *Restatement* §§ 202(3)(b), 222.

The appropriate inquiry here, therefore, is the common meaning of "sugar" in the 1921 bottling trade.[9] In 1921 the industry knew "sugar" could refer to more than sucrose. *See* DX 12 (Nat'l Bottlers' Gazette, Feb. 5, 1918, at 71- 73); DX 32 (Nat'l Bottlers' Gazette, Feb. 5, 1919, at 108). The broad chemical definition was not commonly used in the trade, however. *See, e.g.*, DX 12, at 71 ("Sugar is really a sort of family name—which is not the popular idea."). Sucrose was the preferred sweetener and was "the familiar sugar of commerce." Tr. 1776, 1777 (Shallenberger).

Government regulations rationing sugar during World War I defined "sugar" as "the manufactured product, 'sucrose,' " PX 137. This definition included refined cane and beet sugar, *id.*, and excluded molasses, corn syrup, grape sugar, cerelose, maple sugar, and refiners' syrups. PX 150. Various industry and government publications discussed the

[9] Evidence that the lay definition of "sugar" does not include HFCS-55, or that the chemical definition does include HFCS-55 and that sucrose in an acid solution like Coca-Cola "inverts" to fructose and glucose, is useful only to the extent the parties were aware of and had adopted those understandings. Dictionary definitions, which span a broad range, likewise are themselves not very helpful.

use of sugars including corn syrup, corn sugar, maltose syrup, honey, and refiners' syrup as "sugar substitutes" for "ordinary sugar." *See, e.g.*, DX 12; DX 15; DX 16 (Nat'l Bottlers' Gazette series, "Sugar Substitutes in Bottled Soft Drinks"); PX 145; PX 146; PX 147; PX 149; PX 151; PX 152; PX 153; PX 154; PX 157; PX 160; PX 163 ("The very BEST Sugar Substitute is—CORN SIRUP [sic]."); PX 167; PX 190; PX 193; PX 194; PX 261; PX 262; PX 279; PX 439. Bottlers adding a substitute to sucrose were cautioned that federal law required them to clearly label their products as containing both "sugar" and the substitute.[10] *See, e.g.*, PX 153 (U.S. Dep't of Agriculture release); DX 12, at 73; DX 15; PX 146; PX 147; PX 152; PX 154; PX 160; PX 163; PX 190; PX 194; PX 279; PX 439.

The Court concludes the industry practice at that time was to use a modifier or specific term when referring to sugars other than sucrose. The 1921 bottling trade for the most part used "sugar" standing alone to refer to sucrose from cane or beet. *But see* DX 32 (defining "sucrose" as cane sugar).

The next question is whether the parties to the Consent Decrees were aware of this industry usage. It is reasonable to assume that businessmen in the soft- drink trade would receive publications and notices directed to the trade and would be aware of the common industry definition of "sugar." Several specific uncontroverted facts, however, make it unnecessary to rely entirely on this assumption.

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[10] Defendant objects that no federal regulation has ever expressly addressed the labelling of "sugar" in soft drinks. Dkt. 366, at 57, 78- 81. Whether a formal regulation exists, however, is not the issue. What is relevant is that the appropriate federal regulatory agency, like the trade itself, has indicated that "sugar" means sucrose.

The relevance of this should not be overemphasized, however. Labelling guidelines or regulations are intended to protect and inform consumers. Lay understandings and definitions may not correspond to actual industry usage, or the understanding of the parties to the Consent Decrees.

Many bottlers corresponded with the USDA regarding "sugar substitutes." *See infra* p. 1400. *See also* PX 707 and 708 (1922 correspondence between a congressman and bottler). A copy of the 1918 rationing regulation, which defined "sugar" as sucrose, was produced from the files of Harold Hirsch, general counsel for the Company at the time of the 1920 litigation. *See* Dkt. 364 ¶ 266; PX 137. Parent bottlers received notice of this regulation from the Company and forwarded it to the actual bottlers. PX 162. Also produced from the files of Harold Hirsch were a copy of the USDA labelling release, PX 153, and copies of articles cited earlier discussing sugar substitutes. PX 152; PX 194; PX 208; PX 209; PX 232. I conclude the parties to the Consent Decrees were aware of industry usage of the term "sugar" to refer to granulated sucrose.

C. *Contemporaneous Usage by the Parties*

Industry usage does not control if the parties to the Consent Decrees had a different definition in mind with regard to the use of the term in paragraph 10.[11] While the industry may have referred to both cane sugar and beet sugar as "sugar," the parties clearly meant only cane sugar.

It is plain that the parties did not use the term "sugar" to refer to sugar derived from corn. Sucrose, and more particularly sucrose from cane, was the preferred sweetener in the industry. Tr. 1776-77 (Shallenberger) (sucrose); DX 22, at 86 (cane); DX 32, at 108 (cane). Substitute sweeteners used by the Company during the World War I period proved unsatisfactory. PX 189; PX 287; PX 708.

Many Coca-Cola bottlers corresponded with the U.S.

[11] The Court has already found the term "sugar" in paragraphs 5, 6, and 7 refers to refined sugar from cane, creating a presumption that the same meaning should be applied to "sugar" in paragraph 10. See supra pp. 1398-99.

Department of Agriculture regarding "sugar substitutes." *See, e.g.*, PX 179; PX 181; PX 182; PX 183; PX 184; PX 185; PX 203; PX 216. Among these bottlers was the Birmingham Coca-Cola Bottling Co., whose founder, Crawford Johnson, was Chairman of the Special Committee of the Coca-Cola Bottlers' Association and an intervenor in the 1920 litigation. PX 185; PX 198. In 1922, a bottler who was a member of the Coca-Cola Bottlers' Association "Executive Counsel" [sic] (*see* PX 584) likewise distinguished "sugar" from the "substitutes" suggested by the government during the war. PX 708. Charles H. Candler, former Company president and chairman of the board, stated in a manuscript autobiography that the Company was "not permitted to buy as much sugar as we needed" and referred to "corn syrup, glucose, invert sugar, etc." as "sugar substitutes." PX 711 at p. 64.

The same meaning was evident in documents relating to the 1920 litigation. *See* PX 462 (letter from J.B. Sizer, attorney for actual bottlers, concerning competitive impact on bottlers of the fall of "sugar" prices); PX 3 (intervenors' petition, citing "sugar" prices); PX 3 (Company's answer p. 3, referring to "market price of sugar suitable for the manufacture of COCA-COLA syrup").

Particularly persuasive is the apparent genesis of the requirement in paragraph 10 of "five and thirty two one-hundredths (5.32) pounds of sugar." The Third Affidavit of Charles H. Candler, filed in this Court on June 7, 1920, states:

> Deponent says that during his connection with The Coca-Cola Company of Georgia it was part of his [Candler's] duty to keep himself informed as to the price of *granulated sugar;* that *sugar* is one of the main ingredients of Coca- Cola....
>
> Deponent says that it has been a part of his duty

> in manufacturing Coca-Cola to keep himself acquainted with the cost of manufacturing the same. Deponent says that fifty-one and one-half (51 1/2 %) per cent. by weight of each gallon of Coca-Cola is sugar, there being in each gallon of bottling Coca-Cola Syrup *five and thirty-two one-hundredths (5.32) pounds of sugar.*

PX 1 (R.1605-06) (emphasis added). In a settlement proposal dated February 5, 1921, Charles V. Rainwater, representing the parent bottlers, stated: "Our proposition is ... that the future price shall be on a sliding scale of the price of *sugar* alone figured upon the basis of 5.32 *pounds of standard granulated sugar* to the gallon of syrup...." PX 557 (emphasis added). Paragraph 10 of the agreed-upon settlement provides the syrup "shall contain not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup." PX 4; PX 5.

Defendant has cited no documents contemporaneous with the negotiation or entry of the 1921 Consent Decrees in which any of the parties used the term "sugar" standing alone to refer to corn syrup, glucose, or any sweetener derived from corn. HFCS-55 was not yet developed.

While beet sugar was, like cane sugar, subject to rationing during the war and was often referred to as "sugar" in the trade, the Court finds the parties did not intend to include beet sugar within the meaning of "sugar" in paragraph 10. Sucrose processed from sugar beets was not an acceptable sweetener at that time because the refining procedure tended to allow certain impurities to remain which could cause bottle syrup to sour. *See* PX 741, at 4; *see also* DX 22, at 86; DX 24, at 74; PX 238. Granulated sucrose from sugar cane was therefore used by The Coca-Cola

Company in the manufacture of Bottlers Syrup. PX 741, at 4.

While not controlling, the opinion of John M. Mount, a former Director of the Purchasing Department at the Company and Senior Vice-President upon his retirement in 1981, with regard to the term "sugar" in paragraph 10 is nonetheless instructive: "Sugar in 1921, I believe, as I have read part of the decrees, not having been there, probably meant to refer to sucrose produced from raw cane sugar at that time.... In my reading and interpretation, no, it didn't ["refer in the context of 1921 to any corn sweetener"]. Tr. 221-22 (II Mount Dep. 265-66).

I conclude the parties used the terms "sugar" and "standard granulated sugar" interchangeably to refer to high quality granulated cane sugar, and did so in the Consent Decrees.[12]

D. *History and Purpose of Consent Decrees*

The history and purpose of the 1921 Consent Decrees provide evidence consistent with the Court's finding that the parties used the term "sugar" in paragraph 10 to refer to granulated cane sugar. The Court rejects defendant's theory that paragraph 10 was intended solely as a quality control provision, and that therefore the term sugar was used in its broad generic sense. While paragraph 10 had a quality control objective, it was also intended to supplement the pricing provisions of paragraphs 5, 6, and 7.

Paragraph 10 does address quality control. The Company in that paragraph promises the syrup sold by it to

[12] The Court rejects defendant's alternative inference that the parties carefully used the term "sugar" without modifiers in paragraph 10 to allow the Company more flexibility in selecting ingredients for Coca-Cola syrup. Dkt. 366, at 61-62. See *supra* p. 1398 ("sugar" used without modifiers four times); *infra* pp. 1398-1403 (purpose of ¶ 10).

parent bottlers will be "high grade standard Bottlers Coca-Cola Syrup, and shall contain not less than five and thirty-two one-hundredths (5.32) pounds of sugar to each gallon of syrup." PX 4; PX 5. Quality was addressed by the requirement of "high grade standard Bottlers Coca- Cola Syrup" and the requirement of at least 5.32 pounds of sugar. The Company's theory that quality control was the sole focus of paragraph 10, however, does not withstand scrutiny. It is highly improbable that parent bottlers concerned about quality would insist on a precise minimum amount of "sugar" but would be wholly indifferent to what sort of "sugar" is used. Moreover, there is no reason to assume at least 5.32 pounds of a substitute "sugar" would be needed to assure high quality Bottlers Syrup.

Paragraph 10 is best explained as both a quality-control and price-protecting provision. As recounted earlier, *see supra* pages 1394-95, the actual bottlers suffered financially during the period when the price of Coca- Cola Bottlers Syrup was much higher than the syrup prices paid by their competitors. In addition, both the actual bottlers and the parent bottlers were antagonistic toward and distrustful of the Company. It is against this background of hostility and distrust that the parties drafted paragraph 6 of the Consent Decrees, which states in pertinent part that:

> 6. In order to promote the sale of Coca-Cola and enable the actual bottlers to compete with other beverages, the party of the first part [the parents] hereby agrees to sell such syrup to the bottlers purchasing from it at not exceeding one dollar and thirty cents ($1.30) per gallon, including five cents (5¢) per gallon for advertising matter to be delivered, and an additional six cents (6¢) per gallon for

such syrup for each advance of one cent (1¢) per pound in sugar above seven cents (7¢) per pound, and on the same basis for a fractional advance....

PX 4; PX 5.

The express competitive-pricing rationale recited in paragraph 6 for tying the price of syrup to the price of sugar at a six-to-one ratio[13] is undermined if the Company can use a cheaper sweetener but continue to employ the paragraph 6 pricing mechanism. The requirement of 5.32 pounds of sugar in paragraph 10 ensures the Company cannot evade the pricing provisions of paragraphs 5, 6, and 7, and increase the effective syrup price to the bottlers, by reducing the amount of sugar to less than 5.32 pounds *or* by using cheaper substitutes.[14]

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[13] The syrup price increase was rounded up from 5.32¢ to 6¢ per gallon to account for all increases in other syrup costs. *See* PX 4 ¶ 5; PX 5 ¶ 5 ("same to include all possible increases in the cost of producing such syrup," except increases subject to arbitration).

[14] The bottlers were familiar with the use of cheaper sweeteners and variations in syrup strength. *See* Admitted Facts ¶¶ 37, 53 (use of substitutes including corn syrup, beet sugar, and invert sugar during World War I); PX 177, PX 189, PX 287, PX 708 (substitutes inferior); Admitted Facts ¶ 39 (1899 contract: one ounce syrup to eight ounces water; some contracts 1907-16: 89/100 ounce syrup "to each eight ounce bottle"); PX 105 at 32-34 (Charles H. Candler testimony in 1911: one ounce Bottlers Syrup to seven ounces water); Admitted Facts 57¶ 45-47 (1916 "Root bottle": one ounce syrup to five-and-one-half ounces water); PX 766 at 99 (1929 accountant's report: before World War I, 6.36 pounds sugar per gallon Bottlers Syrup); DX 220 (report suggesting 5.97 pounds sugar per gallon Bottlers Syrup 1916-18). *See also* PX 1 (R. 902-03, 1243) (Company used saccharine until 1907).

The "Norit process," under development by the Company at the time of the Consent Decrees, produced a "water-white" syrup directly from raw sugar. PX 1 (R. 2261). The process was experimental, *id.* at 2262, and was apparently unsuccessful and never utilized. The Court cannot find actual use of the Norit process was contemplated by the parties to the settlement.

Defendant argues that so long as the strength of the syrup is maintained, (*i.e.*, the cheaper sweetener is not an inferior sweetener), bottlers are not cheated of their bargain if the Company uses a cheaper sweetener. Defendant cites correspondence from J.B. Sizer, attorney for the actual bottlers, suggesting that the profits of the Company and the parent bottlers were "entirely immaterial" if the bottlers paid a price for syrup "that is not in excess, or greatly in excess, of the prices at which other soft drinks are sold." PX 581. *See also* PX 587; PX 601.

The short answer to defendant's argument, and the fact to which the Court must return, is that the 1921 Consent Decrees were premised on the use of granulated cane sugar as a sweetener. In light of the experience of the parties prior to the entry of the Decrees, as well as the strong bargaining position enjoyed by the bottlers after the decision of this Court and argument before the Court of Appeals,[15] the Court finds it unlikely they would enter into an agreement that allowed the Company to exploit a cheaper sugar in the manufacture of Coca-Cola Bottlers Syrup but keep the price of that syrup tied to the price of granulated sugar.

Now that a fully acceptable substitute has been developed, and is being used in competing brands, it is in the interest of both the Company and the bottlers to use that substitute in place of sugar. The effect of paragraph 10's sugar requirement is to require the Company to secure the consent of the bottlers before that change is made. It is the task of the parties, not of this Court, to refashion the agreement to reflect new

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[15] "[T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *ITT Continental*, 420 U.S. at 235-36, 95 S.Ct. at 933-34 (quoting *Armour*, 402 U.S. at 681-82, 91 S.Ct. at 1757) (emphasis in original).

developments. *See Coca-Cola*, 269 Fed. at 805.

E. *Post-1921 Course of Performance and Usage*

The course of performance and usage of the parties since the entry of the Consent Decrees in 1921 are consistent with the conclusion that "sugar" was not meant to include HFCS-55.

1. *Course of Performance*

Both plaintiffs and defendant cite examples of actions since the entry of the Consent Decrees. The Court concludes the course of performance between the parties has broadened the meaning of the term "sugar" in paragraph 10, but that meaning still does not encompass HFCS.

a. *Use of Beet Sugar*

After quality problems with beet sugar were solved in 1941, the Company began to use beet sugar in Bottlers Syrup. DX 641; Tr. 735-36 (Mount). The Company subsequently purchased roughly one-third of its sugar requirements from beet processors, a percentage based on the beet industry's share of the total United States sugar quota. Tr. 2819-20 (Konzal); DX 421. The price differential between cane and beet sugar was eliminated in 1967. Tr. 2796 (Konzal).

[2] Bottlers have known about the Company's use of beet sugar for many years. Tr. 3210-11 (Schmidt) (since sometime after 1955, in 1960s or early 1970s); Tr. 3332-33 (Denny) (25 years). Because the use of beet sugar was not contemplated by the Consent Decrees, plaintiffs had the right to object to its use.[16]

[16] That cane sugar and beet sugar are indistinguishable when properly refined, PX 741, at 4; PX 1013, is not determinative. *See supra* pp. 1401-03 (quality control not sole purpose of paragraph 10). The parties to the Consent Decrees intended "sugar" to mean refined granulated cane sugar when they drafted the agreement and tied the price of syrup to refinery prices.

Their failure to do so has resulted in a waiver of that right.[17]

The beet-sugar waiver has not, however, thrown open the door to the use of any sweetener. Waiver is based upon intent, and that intent must clearly appear from the evidence. *George v. Frank A. Robino, Inc.*, 334 A.2d 223, 224 (Del.1975). *See also Billman v. V.I. Equities Corp.*, 743 F.2d 1021 (3d Cir.1984). In this case, there is no evidence the plaintiff-bottlers waived the right to object to the use of HFCS in place of sugar. In effect, the term "sugar" in the Consent Decrees now means granulated sugar from cane or beet.[18] That definition still excludes HFCS.

b. *Use of Liquid Sucrose*

Defendant asserts the Company's unchallenged use of "liquid sucrose" since the 1950s also demonstrates the term "sugar" in paragraph 10 should be broadly defined. The Court disagrees.

"Liquid sucrose" refers to a sucrose obtained by dissolving granulated sugar in water. Tr. 409 (Sequeira). It is immaterial for purposes of the Consent Decrees whether granulated sugar is in granular form or is dissolved in water. Liquid sucrose produced from granulated beet sugar, *see* Tr. 1812 (Cunningham), should be treated like dry granulated beet

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[17] The Company's continued experimentation with various sweeteners after entry of the Consent Decrees neither violated the terms of the Decrees nor obligated bottlers to object in order to preserve their rights. Mere experimentation has no impact on the meaning of "sugar" in paragraph 10.

[18] Plaintiffs claim that market prices quoted by beet processors should be included in the paragraph 7 calculation of "market price" if those processors are among the ten largest domestic sugar producers. The Court disagrees. Paragraph 7 expressly refers to "refineries." The Court will not reform that term to accommodate the bottlers' waiver with respect to beet sugar.

sugar under the Consent Decrees. Plaintiffs have waived an objection to beet sugar. *See supra* p. 1403. Liquid sucrose produced from cane sugar, on the other hand, must be regarded as dry granulated cane sugar and therefore satisfies the definition of "sugar" in paragraph 10.

In sum, the Company's use of liquid sucrose does not affect the meaning of "sugar" in paragraph 10.

c. *Tolling*

"Tolling" is a practice in which the Company buys raw sugar and then hires a refiner to refine it. Tr. 2807 (Konzal). The Company uses this contractual arrangement with regard to most of its cane sugar. *Id.*

Defendant questions why tolling may be used to enhance the Company's profits but HFCS may not be used as a sweetener to achieve the same goal. Dkt. 365, at 6 n. 17. The plain answer lies in the terms of the Consent Decrees, which specify the "sugar" to be used in the syrup but say nothing with regard to the mechanics of purchasing that sugar. The parties clearly contemplated that the Company's actual costs could increase or decrease over the life of the Consent Decrees and that the Company's profits would vary with its acumen in the sugar market. They consciously chose to tie the cost of syrup to the average cost of sugar irrespective of how the Company purchased it. The practice of "tolling" is simply not relevant to paragraph 10.

2. *Usage*

The parties' usage of the term "sugar" since 1921 is consistent with the Court's finding that that term does not include HFCS-55.

a. *In General*

Notwithstanding its chemical definition, "sugar" continues to mean sucrose in the trade. Tr. 1768 (Shallenberger). Donald A. Leslie, who was employed by the Company from 1933 to 1971, purchased sugar in the Purchasing Department from 1946 to 1969, and became Director of Purchasing and Company Vice-President, testified that "sugar" standing alone meant refined sugar from cane or beets and that the term "sugar" was never used within the Company during his tenure to refer to corn sweeteners, which were called "sweeteners." Tr. 810-11 (I Leslie Dep. 23). John M. Mount, who worked in the Purchasing Department from 1946 to 1981 and was Vice-President and Director of Purchasing from 1969 to 1981, testified that while the term "sucrose" was used when talking to "the technical people," "[t]he terminology in the trade was that if you spoke of refined sugar, it was refined sugar produced from cane or beets." Tr. 746 (I Mount Dep. 70). Stanley J. Konzal, who has worked in the Purchasing Department's Sweetener Section since joining the Company in the early 1960s and is now Assistant Director of Purchasing, acknowledged that "[a]s a matter of business dealings, from day-to-day, we are not going to be dealing with the terminology strictly in the technical terms" and that the trade "as a matter of convenience" used "HFCS" to mean HFCS and "sugar" to mean sugar from cane or beet. Tr. 2898-2901.

These working definitions were employed in Annual Reports of the Purchasing Department, which distinguished, and compared the prices of, "sugar" and "HFCS." PX 857 (1974); PX 864 (1975); PX 870 (1978); PX 887 (1979); PX 889 (1980). A March 1979 report by the Company's Corporate Technical Division, "Sweetener Policy for Coca-Cola," also used this terminology, recommending that bottlers be

authorized to use "only sucrose (sugar), either granulated or liquid" and reporting favorable taste test results "from the substitution of second-generation high fructose corn syrup (HFCS-55) for sugar in Coca-Cola...." PX 891, at 1. Numerous other internal Company memoranda likewise use "sugar" to refer to sucrose and "HFCS" to refer to HFCS. *See, e.g.*, PX 929 (sugar/HFCS usage and cost); PX 949 (same); PX 951 (same); PX 930 (price forecasts); PX 916 ("Report on Sugar Procurement— 1980"); PX 898 ("Use of Sugar vs. HFCS"); PX 926 ("Sugar Purchase Program 1980-81"). Syrup price notices sent to bottlers also used the term "sugar" to refer to refined sucrose. *See* Tr. 1330-33 (I Blanchard Dep. 83-86) (understanding of Company Vice-President and Manager of Contractual Dep't); Tr. 1965-66 (Delauter) (understanding of bottler). *But see* DX 577 (June 8, 1979 memorandum from Roberto C. Goizueta to John Ogden, both senior officers, referring to "beet sugar," "cane sugar," and "this new sugar from corn" (HFCS)).

Defendant has cited no internal Company document or discussion prior to 1980 stating that the term "sugar" in paragraph 10 refers to anything but sucrose. *See also* Tr. 225 (I Blanchard Dep. 281) ("I am unaware of any such conversation."); Tr. 226-27 (I Susong Dep. 59, 62, 66). Defendant admits it had never prior to January 1, 1980 communicated to any parent bottler, actual bottler, or third party that the term "sugar" in paragraph 10 of the Consent Decrees or any first-line bottlers contract: is a generic term describing a wide variety of carbohydrates (as alleged in par. 31 of its Answer in this case); means any product other than sucrose; or includes any sweetener from corn. PX 981, 982 (Defendant's Confidential Responses to Plaintiffs' Second Interrogatories to Defendant, Nos. 8 & 9) ("The company is not presently

aware of any such communication").[19]

b. *Labelling*

Unlike the usage outlined in the previous section, the Company's usage in ingredient labelling is not probative. Upon the introduction of HFCS in allied lines in 1974, the Company decided to label it "corn sweetener." PX 862; *see also* PX 878. Plaintiffs contend this constitutes an admission by the Company that HFCS is not "sugar." At best, however, the labelling decision evinces the Company's recognition that the Food and Drug Administration does not regard HFCS as "sugar" for labelling purposes. The tenuous link between government labelling requirements and the scope of the term "sugar" in paragraph 10 of the Consent Decrees has already been noted. *See supra* note 10.

The Company's 1980 decision to label HFCS "sugar" when introduced in Coca- Cola, PX 903, at 2, and its subsequent decision in 1985, four years after the commencement of this lawsuit, to change the label to read "sucrose and/or high fructose corn syrup," is likewise unpersuasive.

c. *1978 Amendment*

The Company's interpretation of and conduct under the 1978 Amendment to the first-line bottler's contract are persuasive evidence that the parties' understanding of the term "sugar" does not include HFCS-55.

The 1978 Amendment recites that it reflects a finding by the Company and the bottlers that it is "in their mutual best

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[19] Defendant argues the Company had no reason to publicly declare its interpretation of the word "sugar" before 1980, because until then only sucrose met its high quality standards. Dkt. 366, at 69. The Company nevertheless referred to the other sweeteners with which it experimented as "sugar substitutes" or "another sweetener." A high-quality substitute remains a substitute, and does not become the material replaced.

economic interest" to amend their previous contracts. PX 880. Under the Amendment, the syrup price is the sum of two components: the "Sugar Element" and the "Base Element." The Amendment specifies:

> In the event that the formula for Bottle Syrup is modified to replace sugar, in whole or in part, with another sweetening ingredient, the Company will modify the method for computing the Sugar Element in such a way as to give the Bottler the savings realized as a result of such modification through an appropriate objective quarterly measure of the market price of any such sweetening ingredient. The Sugar Element would continue to fluctuate in the manner described above for sugar.

Id. ¶ 1(c).

The Court finds the parties intended the term "sugar" in the 1978 Amendment to mean the sugar then used in Coca-Cola Bottlers Syrup: sucrose from cane or beet. *See* Tr. 2216, 2226, 2229 (Blanchard); Tr. 1965-67 (Delauter); *see also* PX 880 ¶ 1(b) (cane and beet sugar prices used to determine "Sugar Element"); PX 875, 883 (explanatory material) (bottlers to receive savings from any use of "non-sucrose sweetener").

In 1980, the Company began to use HFCS-55 in the manufacture of Coca-Cola Bottlers Syrup. PX 909. The Company passed through to the amending bottlers the savings realized through use of the substitute. PX 905; PX 906. By utilizing the pass-through provision of paragraph 1(c), the Company has conceded HFCS is not "sugar" but "another sweetening ingredient" for purposes of the Amendment. This contemporary understanding of the term "sugar" is consistent with and therefore supports the Court's

conclusion that HFCS is not "sugar" for purposes of the 1921 Consent Decrees.

F. *Conclusion: "Sugar" in Paragraph 10*

[3] I conclude the parties to the settlement agreements that became the Consent Decrees intended the term "sugar" in paragraph 10 to mean refined granulated sucrose from cane. The use of sugar from beets violated the Consent Decrees, but the bottlers waived objection to that violation. Thus, the effective present meaning of the term "sugar" in paragraph 10 is refined granulated sucrose from cane or beet, a definition that excludes HFCS-55.

IV. *The Meaning of "Market Price" in Paragraph 7*

[4] Paragraph 6 of the 1921 Consent Decrees[20] fixes the price of a gallon of Coca-Cola Bottlers Syrup at $1.30. The price is to increase by an additional six cents per gallon for every increase of one cent per pound in sugar above seven cents per pound, with the same proportions to apply for a fractional increase.[21] The formula for determining the price of sugar is set forth in paragraph 7, which reads:

> the price of sugar is to be determined quarterly, January, April, July and October in each year, by averaging the market price of standard granulated sugar during the first week in such quarter, as quoted at the refineries by the ten refineries

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[20] *See supra* note 2.

[21] Paragraph 5 governs the price of syrup delivered by The Coca-Cola Company to the parent bottlers, *see supra* note 2, and paragraph 6 the price of syrup from the parents to the actual bottlers. Paragraph 5 provided the price would be $1.175 per gallon, with an escalator clause identical to that in paragraph 6. Because The Coca-Cola Company has acquired all the parent bottlers, Admitted Facts ¶ 111, it is entitled to deal directly with the actual bottlers and charge the paragraph 6 price per gallon.

> operating in the United States of America at the time, having the largest capacity and output.

PX 4; PX 5.

It is plaintiffs' position that the parties to the 1921 Consent Decrees intended the term "market price" as used in paragraph 7 to be

> an average of the actual selling price of the basis grade of refined sugar being charged f.o.b. the refineries by the 10 largest sugar refineries in the United States on sugar sold in wholesale lots for prompt shipment to industrial users during the first seven days of each calendar quarter, after the deduction of any rebates, discounts, or allowances from the list price that were known to The Coca-Cola company (other than the standard 2% discount for cash or payment within seven days).

Dkt. 364 ¶ 34. Plaintiffs argue this intent is shown by examining: (1) the objective of the parties in drawing up the Consent Decrees; (2) the "ordinary meaning" of the term "market price"; (3) the parties' contemporaneous usage of "market price"; and (4) the course of performance in computing the market price under the contract. Plaintiffs contend that to determine the market price, the Company has an obligation, every quarter, to seek information on actual selling prices directly from the refiners, from the Company's own broker, from the bottlers, and from its own negotiating experience in the relevant time period. Dkt. 370, at 94-95, 97 (Transcript of Oral Argument, July 23, 1986).

According to defendant, "market price" means the " 'quoted' or 'list' prices publicly announced by the refiners to the trade at large, without taking into account any rebates,

discounts, or allowances which might be negotiated by the Coca-Cola Company or any other purchaser in a specific transaction." Dkt. 362 ¶ 81.[22] Defendant argues the bitter pre-settlement experience caused the bottlers to seek a verifiable price, and "list" or "quoted" prices were and are the only prices known to both parties; and, most tellingly, the parties have consistently used "list" or "quoted" prices in applying the market-price formula.

Plaintiffs acknowledge some sales take place at the "list" price, and to that extent it may be said the list price is an "actual selling price." The nub of this dispute, however, is what price should be used when sales occur below list. Defendant would use the official list price as the market price even if 99% of sales took place below list. Dkt. 370, at 126. Plaintiffs would have the Company use the lowest known selling price, regardless of whether it was a "list" price.

Neither of the interpretations urged by the parties is found merely by examining the words "market price ... as quoted at the refineries" found in paragraph 7. Accordingly, the Court must look beyond the document itself in order to ascertain the intent of the parties as to the meaning of "market price."

A. *The Objective of the Parties to the 1921 Consent Decrees*

Plaintiffs urge the only objective of the parties in including a pricing formula in the 1921 Consent Decrees was to ensure the bottlers received syrup at a competitive price. As plaintiffs point out, paragraph 6 of the Consent Decrees expressly states only one objective: "to promote the sale of

[22] This opinion will refer throughout this section to a " 'quoted' or 'list' " price in accordance with defendant's usage.

Coca-Cola and enable the actual bottlers to compete with other beverages...."[23] Defendant contends the objective was to set a mutually verifiable price. The Court finds that as a result of their experience under the June 10, 1920 consent order, the parent and first-line bottlers had both these objectives.

As recounted above, *see supra* pp. 1392-95, the bottlers' previously harmonious relationship with the Company had become extremely antagonistic and distrustful during 1920 and 1921 as the litigation continued. The price of Coca-Cola Bottlers Syrup was steadily increased, even as the price of sugar and of competing soft drinks fell. The first-line bottlers in particular were squeezed by higher syrup prices and declining sales volume. The bottlers saw the Company's mendacity and greed as the source of their economic distress.

The settlement discussions in late 1920 proceeded concurrently with the syrup price increases. In November 1920, the Company proposed the price of syrup be adjusted quarterly based on its total actual costs, as verified by a certified public accountant. Admitted Facts ¶ 85; DX 92. This was rejected. In February 1921, after another exchange of offers and shortly before the filing of the Supplemental Complaint, the parent bottlers proposed that syrup price should vary according to the "market price" of sugar alone. Admitted Facts ¶ 90.

Negotiations broke down, to resume later in the spring of 1921 after the District Court had rendered a decision favorable to the bottlers and the bottlers had received favorable indications during oral argument before the Court of Appeals for the Third Circuit. PX 601. A Memorandum of Settlement using a "market price" formula was signed on June 18, 1921.

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[23] See *supra* note 2.

Sizer, the attorney for the first-line bottlers, wrote to John Sibley, the attorney for the Whitehead-Lupton Company, on March 4, 1921 explaining the rationale for the decision to base the price of Coca-Cola syrup on the "market price" of sugar.

> They [the actual bottlers] are willing to pay a price for the Coca-Cola syrup that is not in excess, or greatly in excess, of the prices at which other soft drink syrups are sold. If they can get their syrup at that price it is entirely immaterial with them whether The Coca-Cola Company and the parent bottling companies make ten cents a gallon or fifty cents a gallon profit. On the other hand they cannot prosecute their business successfully if the price of Coca-Cola syrup is out of proportion to the prices of other syrups; and for example they cannot do business at all if they should have to pay as much as $2.22 per gallon for Coca-Cola syrup when other soft drink syrups are selling at around $1.50 to $1.75 per gallon.... The prices which the actual bottlers are willing to pay and able to pay cannot be controlled by the question of profits which the manufacturer of the syrup or the parent bottling companies are asking, but it must depend on the market price of other syrups of similar character.

PX 581. Sizer wrote Rainwater in a similar vein on March 11, 1921. PX 587.

This history reveals the actual bottlers' anxiety over their competitive position. They were willing to pay some minimal premium above their competitors so long as they remained able to compete. *See* PX 581, PX 587. Also apparent,

however, is the bottlers' concern with verifying the Company's cost figures. Both plaintiffs and defendant agree the bottlers at this juncture greatly distrusted The Coca-Cola Company, *see* Dkt. 348, at 78; Dkt. 364 P 140(g), because of the Company's insistence in late 1920 on recouping its costs at the expense of the bottlers, and its reluctance to open its books for inspection.

Plaintiffs' definition of market price as the actual selling price is fully consistent with the objective of obtaining a competitive price but is less convincing when weighed against the objective of verification. Conversely, defendant's definition comports well with the need for verification but utterly fails to meet the need for a competitive price. Merely examining the objectives of the parties is thus not determinative in deciding how to interpret "market price" as used in the 1921 Consent Decrees.

B. *Ordinary Meaning*

Plaintiffs seek to establish that "selling price" was the ordinary meaning of the term "market price," as defined by dictionaries and case law roughly contemporaneous with the 1921 Consent Decrees. *See Carey Lithograph Co. v. Magazine & Book Co.*, 70 Misc. 541, 624, 127 N.Y.Supp. 300 (1911) (defining market price as "a price fixed by a buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition."); 3 Universal Dictionary of the English Language 3043 (1899).

Establishing the ordinary meaning of "market price" does not significantly advance plaintiffs' position. In light of defendant's failure to rebut these definitions, a presumption does arise that they were used by the parties. The presumption is not a strong one, however, for these definitions reflect ordinary commercial understanding and are not linked to

the sugar trade. Plaintiffs have presented no evidence as to how "market price" was defined for the sugar market, with which the Consent Decrees were concerned.

C. *Contemporaneous Usage by the Parties*

Plaintiffs also argue the parties' contemporaneous usage of the term "market price" indicates they understood it to be synonymous with the actual selling price and quite different from a "list" or "quoted" price.

1. *Before Execution of the Consent Decrees*

A number of those principally involved in the 1920-21 Delaware litigation expressly distinguished between The Coca-Cola Company's cost of sugar and the "market price" of sugar in statements to the effect that they understood the Company's cost of sugar was less than the prevailing "market price."[24] *See* PX 1 (R. 1609) (Charles Howard Candler), PX 1 (R. 2588) (C.V. Rainwater and George T. Hunter); PX 557, PX 563 (correspondence between W.C. Bradley, Chairman of the Board of The Coca-Cola Company in February, 1921, and C.V. Rainwater). Plaintiffs urge this usage reflects the parties' understanding that the Company was using sugar purchased in advance of use under long-term contracts. *See* Dkt. 364 ¶¶ 147-50. The bottlers expected the Company's "cost of sugar" would approximate the "market price" once the Company began to buy sugar currently on the market. *See* PX 463 (J.B. Sizer to Crawford Johnson (Oct. 18, 1920) ("I am very much inclined to the opinion that when the first of November comes around we will find that they will be buying sugar at or about the prices then quoted on the market.")); *see also* PX 474 (C.V. Rainwater to C.H. Candler (Oct.

[24] The litigants do not contend that "market price" is to be equated with the Company's cost of sugar.

30, 1920) ("there has been a great reduction in the market price of sugar, and we are unable to understand why there is not a considerable reduction in the cost of the manufacture of bottler's syrup.")).

This evidence does tend to show that by "market price" the parties meant a price at which sugar could be bought—an actual selling price, as plaintiffs contend. Assuming the parties intended "market price" to be an actual selling price, however, does not run counter to defendant's assertion that "market price" meant a "quoted" price at which some sugar was sold. As defendant points out, J.B. Sizer, the attorney for the first-line bottlers, used the term "the price *quoted* on the market" (emphasis added) to describe the price at which the Company "will be buying sugar". PX 463.

Plaintiffs cite, as particularly probative of their contention that the parties distinguished "market price" from a "list" or "quoted" price, an exchange between the parties with regard to the Company's 1920 contract with American Sugar Refining. On October 30, 1920, Rainwater wrote Candler inquiring why the price of syrup would be increased as of November 1, since the bottlers had understood

> that The Coca-Cola Company had a contract with one of the largest refiners in the country for a sufficient quantity of sugar to meet your requirements for the year 1920, the price to be determined by the market price every Monday morning.

PX 474. Candler responded The Coca-Cola Company had entered into an agreement "for a specific quantity of sugar to be delivered each week for a specified number of weeks, the price to be determined by the refiner's price in effect each Monday morning," but that deliveries had been completed on that contract on August 16, 1920. PX 482 (Nov. 3, 1920).

In their Supplemental Complaint filed with the District Court in February, the bottlers charged the Company with fraud by having represented to them that the Company had "a verbal agreement with a large sugar refinery to supply [its] needs for the balance of the year, at a price fixed by the market price prevailing each Monday morning." PX 3 (Supplemental Complaint ¶ 3). The Company in its answer controverted the bottlers' understanding of this particular contract:

> This price was not dependent upon the market price of sugar, but was dependent upon the price made on every Monday morning by the American Sugar Refining Company.

PX 3 (Answer to Supplemental Complaint ¶ 13). The Company went on to state

> that the market price of sugar, as of date August 27, 1920, varied according to the quotation of different refineries, and that on that date the variation was from 17¢ to 22 1/2¢ per pound, and on September 17th it likewise varied from 15¢ to 22 1/2¢ per pound, and on October 29th it likewise varied from 11¢ to 12¢ per pound; that the refineries were practically making their own prices, showing that there was no stability to the market and the purchases made were small, and that if any attempt had been made to make large purchases the sales price of sugar would have immediately ascended.

Id. ¶ 6, at 5-6.

The Court cannot agree with plaintiffs that the parties' exchange over the American contract indicates the parties

distinguished between a "market price" and a "list" or "quoted" price. On the contrary, it tends to show the parties understood a price "quoted" by the refineries to be a "market price." Candler told the bottlers in June that the Company would be purchasing at a price named by the refiner every Monday morning. This "named" price the parties understood to be an "actual selling price"—and they also equated this "named" or "quoted" price with the "market price," as evidenced by Rainwater's letter and by the Supplemental Complaint.

Plaintiffs point out that the Company in its Answer to the Supplemental Complaint expressly distinguished between "market price" and "named" price ("the price made on every Monday morning by the American Sugar Refining Company"). This distinction is not persuasive as to the parties' usage. The parties were then locked in acrimonious litigation; it is not to be wondered that the Company would quibble pedantically over exactly how Candler had represented the American contract to the bottlers.

The Court concludes the lesson the bottlers drew from the American contract was not that "market price" was to be distinguished from a "list" or "quoted" price, but that "market price" should not be tied to the price of any one refinery. The bottlers were agonizingly aware of the volatility of the sugar market during 1920 and that the price from one refinery to another could vary more than 30%, *see supra* p. 1410 (Answer to Supplemental Complaint ¶ 6). Where, as here, the Coca-Cola Company had purchased sugar from a refinery at prices near the high end of the scale, which refinery's "market price" was used was significant. This lesson was reflected in the requirement of paragraph 7 of the Consent Decrees that the market price be determined by "averaging"

the price "as quoted at the refineries" by the ten largest domestic refineries.

Thus, the pre-Consent Decrees usage tends to establish that by "market price" the parties meant an actual selling price. The evidence does not support an inference that the parties distinguished between an actual selling or "market price" and a "list" or "quoted" price.

2. *After Execution of the Consent Decrees*

On July 25, 1921, the three Whitehead-Lupton companies sent letters to their first-line bottlers notifying them of the terms of settlement. PX 645. The letters were approved by counsel for the Company, counsel for the parent bottlers, and counsel for the first-line bottlers. Admitted Facts ¶ 104. On August 9, 1921, the Thomas Company sent their first-line bottlers a substantially identical letter, which also received approval from all parties. *See* PX 655, PX 656.[25] Both letters stated that, as of November 1, 1921, the price of Coca-Cola syrup under the Settlement Agreements was

> $1.30 per gallon, including 5¢ for advertising matter, with a provision for arbitration covering abnormal or burdensome conditions or occurrences, to continue only during same, and subject to an increase based on any increase in cost of sugar above 7¢ per pound.

PX 645.

This use of the term "cost of sugar," in a communication to the bottlers, explaining the settlement, reflects a deliberate

[25] The letter to bottlers in the Whitehead-Lupton territory also sought their consent to the 1921 Amendment to the first-line perpetual contracts which was sent with the letter. *See* PX 645.

choice of words. The settlement was vitally important to the parties, and the pricing provision was key; counsel for the Company would not have approved inaccurate wording. Moreover, this terminology was also used during 1923 and 1924 in letters sent by The Coca-Cola Company to the parent bottlers stating the price of syrup during the first seven days of the quarter. In these letters the Company used the term "cost of sugar" interchangeably with "market price of sugar." Admitted Facts ¶ 109. With the exception of July 1923, the accompanying charts sent out also used the term "Average Cost," not "Average Market Price." PX 995; DX 171.[26]

Plaintiffs' definition of "market price" finds some support in this usage. Certainly the parties understood "market price" to be the "cost of sugar" or "actual price" paid by purchasers. However, this understanding of "market price" does not impose upon the Company any obligation to consider the lowest actual selling price as the "market price."[27]

D. *Course of Performance*

Up to this point, the litigants' contentions have shed little light on construing the Consent Decrees. Far more probative of the parties' intent is the actual course of performance under the contract.

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[26] Defendant objected to the completeness of Plaintiffs' Exhibit 995 on the ground that one version of the syrup price notice for April, 1923 which has been otherwise identified at trial as Defendant's Exhibit 171 had been omitted. Dkt. 361, Objection 2. Since the Court has taken defendant's exhibit into account in using this information, the omission has been remedied, and defendant's objection is moot.

[27] Similarly, the parties' use of "cost of sugar" in other documents of that era, *see* PX 995 (CS1206, CS1203) (C.H. Candler); PX 995 (CS1191, BY1724) (Harrison Jones, Executive Vice-President); DX 148, 154 (Horace Garner, Assistant Director of Purchasing), is no more persuasive.

1. *1922-24*

a. *The Letters Between Candler and Rainwater*

In February 1922 C.V. Rainwater and Charles Howard Candler exchanged letters relating to the calculation of the average market price of sugar during the first seven days of January, 1922.[28] Their figures were in agreement, except that Rainwater had deducted a 2% discount for cash payment.[29]

An internal memorandum to Candler dated February 15, 1922 stated that the "revised figures on the average cost of sugar" given were "based upon the actual quotations made by brokers in market letters to us over the first week in January." DX 151. It appears these broker quotations were used by Candler. There is no evidence the parties used the refined sugar quotations in the *Daily Sugar Trade Journal*, a trade publication issued by Willett & Gray (hereinafter cited as "Willett & Gray"). However, the price of sugar arrived at by the parties is consistent with averaging the basis prices of standard fine granulated sugar published as "refined sugar *quotations* " (emphasis added) in Willett & Gray. Tr. 2486-87, 2634-38 (Eichner). As will be seen from the following discussion of the Willett & Gray market reports, this exchange of

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[28] This was the first time the formula was calculated, since the pricing mechanism had first gone into effect during the prior quarter. The pricing escalator was not in effect, however, because the price of sugar was below 7¢ a pound. Tr. 2484 (Eichner).

[29] The parties disagreed over whether the standard 2% cash discount allowed by a refiner for payment within seven days should be deducted from the market price. The bottlers ultimately acquiesced in the Company's position that the 2% discount was not to be deducted, Dkt. 364 ¶ 195, because as Candler pointed out, "[i]t is optional with the purchaser as to whether he avails himself of this discount." PX 702 (C.H. Candler to C.V. Rainwater (Feb. 15, 1922)). See also DX 149 (H. Hirsch to C.H. Candler (Feb. 13, 1922) (stating cash discount not be taken into account in determining market price, since "[i]t is something taken off or deducted ... at the option of the purchaser")).

correspondence indicates the parties were agreed "market price" meant prices quoted by the refiners, and not necessarily the lowest "actual" selling prices.

During the first few days of January, 1922, Willett & Gray reported differences between the quoted price and the selling price. On January 4, Willett & Gray reported "[w]hile no change is openly reported from the 4.90¢ basis, we have advices from some sections which state that other New York refiners beside the Federal [whose basis was 4.80¢] are selling at 4.80¢." DX 162 (willett & Gray (Jan. 4, 1922)). The next day, the report continued in like vein: "The New York refiners, with the exception of Federal who name 4.80¢, continue to quote 4.90¢ but there is irregularity in prices for out-of-town shipments, some New York refiners selling at the 4.80¢ basis in those localities." DX 162 (Willett & Gray (Jan. 5, 1922)). And finally, on January 6, Willett & Gray wrote: "[t]he quotation of 4.90¢, as far as New York is concerned, can only be considered as nominal as several refiners are quietly quoting 4.80¢." DX 162 (Willett & Gray (Jan. 6, 1922)). Throughout these three days, however, the "refined sugar quotations" given by Willett & Gray continued to be 4.90¢ for all refiners except Federal. DX 162.

Willett & Gray clearly drew a distinction between the "quoted" price and the "actual" selling price. That the parties used figures consistent with the quoted price and apparently did not use the lower selling price, even when the "quoted" price was only nominal, tends to support defendant's position that "market price" means "quoted price."

b. *Computation of the Formula: 1923-24*

In 1923 and 1924, sugar exceeded 7 cents a pound during the second, third, and fourth quarters of 1923 and the

first, second, and fourth quarters of 1924. Admitted Facts ¶ 107. The evidence from this period consists of the telegrams sent and received by the Company; the Company's calculations as compared with the daily Willett & Gray; and language used in Willett & Gray.

i. *The Telegrams*

The only evidence available from the 1923-24 period indicates The Coca-Cola Company obtained the "market price" by sending the refineries daily telegrams during the first seven days of each quarter asking: "Will you wire us collect your market price standard fine granulated close of business yesterday." PX 724; Tr. 2448-49, 2601 (Eichner). Plaintiffs urge use of the phrase "close of business yesterday" in conjunction with the words "market price" supports their position that by "market price" the parties mean "actual selling price." "[C]lose of business yesterday," under this argument, means "the last transaction of the day." Defendant, on the other hand, argues "close of business yesterday" merely sets a uniform and readily ascertainable time to take the list price, which could change during the course of a day. Because both interpretations are equally plausible, this wording supports neither side. Moreover, plaintiffs' argument is undercut by the telegram of April 7, 1924, which asks for the price of standard fine granulated "at once instead of at close of business." PX 732.

The Company received various responses from the different refiners. Two telegrams referred to a "list" price, DX 201 (CS2234; CS2241), five used the words "quoting" or "quotation." DX 201 (CS2237; CS2288; CS2266; CS2277; CS2284). Some telegrams simply gave a price, DX 201 (CS2236; CS2243; CS2244; CS2245; CS2247; CS2265; CS2256; CS2276; CS2283), others "market price today," DX 201 (CS2238), or "our price today." DX 201 (CS2238; CS2279;

CS2280; CS2286). The greatest number gave a price "at close business" or "closing price." DX 201 (CS2246; CS2251; CS2252; CS2255; CS2248; CS2249; CS2258; CS2267; CS2259; CS2260; CS2261; CS2263; CS2268; CS2269; CS2271; CS2273; CS2278; CS2282; CS2285; CS2253). Two telegrams gave both an asking price and a bid price. DX 201 (CS2242; CS2274).

The telegrams simply giving a price or a "market price" are of no assistance in resolving the definitional dispute over "market price." Similarly, those telegrams giving a price "at the close of business" could support both sides. A few of the telegraphed responses tend to support defendant's position. Those telegrams that gave both an asking and a bid price were plainly not reporting an actual selling price. Moreover, that some refiners telegraphed a "list" or "quoted" price indicates those refiners equated that price with "market price."

ii. *Examination of the Calculations*

Comparison of the Company's figures with the daily Willett & Gray[30] for the relevant quarters of 1923 and 1924 reveal the Company uniformly used prices .05 cents per

[30] The parties were able to produce copies of the daily edition of Willett & Gray for most, but not all, of the relevant dates.

[31] Willett & Gray published only the "basis price," which is the price for the grade of sugar known as standard fine granulated sugar. Prices for other grades of sugar were quoted plus or minus a differential from the basis price. In the early 1920s, the basis represented 100 pounds of standard fine granulated sugar in cotton bags. Tr. 758-59 (Mount); DX 312 (F.A. McCaffrey, Lamborn & Co. to John M. Mount (Dec. 3, 1957) (reporting on historical sugar basis grades)). Fine granulated sugar packed in 100-pound paper bags was on March 21, 1947 established as the basis grade by order of the Office of Price Administration. DX 310 (John M. Mount to John C. Staten (Nov. 29, 1957)). Although late in 1947 the refineries ceased to quote a basis price only, and began to give prices for each grade of sugar carried, the trade continued to consider the price of fine granulated sugar in 100-pound paper bags to be the basis price, and that continued to be the only price carried by trade publications such as Willett & Gray. *Id.*

Footnote continued next page

hundred-weight above the Willett & Gray quotations for April 2, 3, 4, 5, and 6, 1923, *compare* DX 164 (Willett & Gray) with PX 995 (CS1181) (Company calculations); for July 2, 3, 5, and 6, 1923, compare DX 176 (Willett & Gray) *with* PX 995 (CS1181) (Company calculations); and for October 1, 2, 3, 4, and 5, 1923, *compare* DX 186 (Willett & Gray) *with* PX 995 (CS1184) (Company calculations). [FN31] Similarly, for January 2, 3, and 4, 1924, the parties used a price corresponding to the quotations published in Willett & Gray, plus a .05 cents differential. *Compare* DX 195 (Willett & Gray) *with* PX 995 (CS1186) (Company calculations). For January 7, 1924, the prices used by the Company differ markedly from those reported by Willett & Gray. For American, the price used by the Company is .15 cents below Willett & Gray. In every other instance, the Company's price ranges from .15 cents to .25 cents above that reported by Willett & Gray. *Compare* PX 995 (CS1195) (Company calculations) *with* DX 195 (Willett & Gray).

For the second quarter of 1924, the Company's figures are uniformly .05 cents above the quotations printed by Willett & Gray. *Compare* PX 995 (CS1195) (Company calculations) *with* DX 197 (compilation of quotations published by Willett & Gray). The Company's figures for the fourth quarter of 1924 are identical to the basis price given in Willett & Gray. Tr. 2484-87; 2634-41 (Eichner).

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There is some dispute between the parties as to whether the Company in 1923 and 1924 computed the "market price" using the basis price of standard fine granulated sugar, or the (higher) price for standard granulated sugar, a coarser grade. The Court makes no finding with regard to this dispute. Following World War II, The Coca-Cola Company has consistently interpreted the term "standard granulated sugar" in paragraph 7 of the Consent Decrees as the "basis price" of fine granulated sugar. *See* Tr. 744-45 (Mount); PX 830; PX 839. This consistent course of performance by The Coca-Cola Company has waived any claim it may have had to use the price of the coarser grade of sugar known as standard.

iii. *Trade Usage in Willett & Gray*

The Willett & Gray reports make it plain that, during this period, "list" price and "quoted" price were the same; and that the actual selling price may have been lower than this price. Willett & Gray also indicates that sales "off list" presage a downward shift in the list, to reflect the actual selling price.

Thus on October 3, 1923, Willett & Gray noted the list prices of 9.50 cents "in many instances ... are not maintained." DX 186 (Oct. 3, 1923). For January 2, 1924, Willett & Gray reported: "Federal and Arbuckle quoting 8.70¢, and although the other refiners have thus far not changed their list price from 8.90¢, there are some accepting business at 8.80¢." DX 195. Similarly, for January 3, 1924, Willett & Gray stated: "Federal and Arbuckle quoting 8.70¢ with the other refiners' list at 8.90¢, although most of the latter are selling at 8.80¢." DX 195. For January 4, Willett & Gray observed "[t]here is no change in the situation, although ... some of the New York refiners other than Federal and Arbuckle are willing to sell at the 8.70¢ basis but ... this price is not available for the Metropolitan District. Federal and Arbuckle continue to quote 8.70¢." DX 195 (Willett & Gray). The "Refined Sugar Quotations" published in Willett & Gray for January 2, 3 and 4, 1924, indicate that only Federal and Arbuckle were at 8.70¢; the others (American, National, Warner, and E. Atkins & Co.) were at 8.90¢. *Id.* Six months later, on July 7, 1924 Willett & Gray reported that all refiners (other than Arbuckle, Federal, and Atkins) "either quote or are selling at" 6.90¢. DX 207 (Willett & Gray). The quoted price for American on that date was 7.00¢, not 6.90¢. *Id.*[32]

[32] Similarly, on January 5, 1925, Willett & Gray reported that although American and National were quoting 7.10¢, they were selling at 6.75¢. *See* DX 383. The price-escalator provision was not in effect during the first quarter of 1925 because the average price of sugar had dropped below 7¢ per pound for that quarter.

At least by the end of this period, the parties were aware there was a difference between the "quoted" price and the actual selling price. On January 11, 1924, John Sibley wrote to Harold Hirsch:

> It has been called to my attention by some of the local bottlers that sugar is being quoted at the Refineries generally at about 10 points higher than business is actually being accepted.
>
> I would be glad if you would look into this and advise me if you do not think that this should be taken into consideration in fixing the price of syrup during the next quarter, if my information is correct.

DX 199. Hirsch did not agree: "it just occurs to me that this suggestion possibly involves a change of the contract, and if that be so then our clients should take the matter up." DX 200 (H. Hirsch to J.A. Sibley (Jan. 12, 1924)). This is the first direct indication that the actual bottlers were aware the Company was using "list" or "quoted" prices, rather than actual selling prices to calculate the price for syrup. Apparently the bottlers' disagreement with the Company's practice was not resolved.

iv. *Conclusion: 1922-24*

This early history of the parties' interpretation of the price-escalator clause of the Consent Decrees reveals the Company undertook the duty of independently ascertaining the "market price" by sending telegrams directly to the refiners. The evidence, particularly as shown by the figures used by the Company on January 7, 1924, reflects the Company did not rely on the quotations given by Willett & Gray, although as a major sugar purchaser the Company could not

have been unaware of such a well-known trade journal.

The evidence also shows the parties knew there was a distinction between the "quoted" price and the actual selling price. The parties disagreed, during that period, over whether the bottlers should get the benefit of the lower selling price. Apparently, however, the bottlers did not pursue this claim, and permitted the Company to price Coca-Cola Bottlers Syrup according to the higher, "quoted" price.

2. *1947 to Present*

Since the third quarter of 1947, the price of sugar has been consistently more than 7 cents a pound. In this period, there is evidence of the Company's practices from several internal memoranda, as well as testimony from persons in the Company's purchasing department. Particularly critical are two memoranda from Homer Thompson, and a 1956 memorandum from C.W. Hodgson.

During World War II and until October 31, 1947, the Coca-Cola Company was paying the ceiling prices for sugar as established by the Office of Price Administration. Tr. 797-801, 830 (Leslie). Because of the price controls in effect at this time, the prices published by Willett & Gray and the refiners' quotations were identical to the selling price.

In June, 1947, with the price escalator provision to be reactivated after 21 years of dormancy, E.J. Forio, the President of the Coca-Cola Company, wrote to DeSales Harrison, the President of the Thomas Company, to confirm the parties' understanding as to how "market price" was to be determined. He explained that quotations were taken from Willett & Gray, "for many years the universally recognized standard statistical service on sugar," and that where Willett & Gray publication dates did not coincide with the contract dates, the

Company would "obtain the necessary quotations directly from the refineries." DX 291 (June 3, 1947); PX 811 (same). Thus, the Company continued to undertake an independent investigation into the market price.

By 1954, under Homer Thompson, it appears the Purchasing Department would use the actual selling price of sugar when it was lower than the quoted price. In a memorandum to E.J. Forio, Thompson wrote:

> Imperial Sugar Company advised us that their selling price (not just their quoted market price) for the entire month of April was $8.65 per cwt. in paper bags. In May they did revert to an earlier $8.30 per cwt. price but according to telephoned advice from this refiner this was not done until May 11th.
>
> Accordingly we were entirely in order in using 8.65¢ per pound as Imperial's quoted price for the first seven days of the second quarter [April 1-7] (parentheses in original).

DX 304 (June 9, 1954). This investigation into the difference between the selling price and the quoted market price was initiated because of a letter from a Texas bottler advising of the discrepancy. *See id.; see also* DX 303 (F.G. Blake to Mac Simms (June 2, 1954) (advising that Imperial Sugar Company's "posted" price advance of 35 points "was not effective")).

A July 6, 1956 memo by Homer Thompson indicates the Purchasing Department would deduct from the "list price" a discount or allowance (except for a discount for cash payment) in order to arrive at the "market price" for purposes of the Consent Decrees. *See* PX 824 (AS6370). Plaintiffs state this

shows the Company interpreted the "market price" to be the actual selling price of sugar after deducting from the refiner's "list price" any discounts or allowances (other than the two-percent discount for cash). Dkt. 364 ¶ 231. The Company asserts this memorandum actually supports its position: that the Company would take into consideration a generally announced allowance off list, available to any purchaser—"in short, a list price." Dkt. 366, at 42. The testimony cited by the Company in support of this proposition was merely that the refiner "had an allowance in part of the territory which they told us about and which was used." Tr. 2984 (Power).[33] This testimony does tend to establish that the discounts deducted from the list price by the Company were not "secret," but could be obtained simply by querying the refiner. The testimony fails to establish that these allowances were available to any purchaser, however. In addition, the evidence fails to support the Company's position that this allowance or discount meant the refinery had set a new list price. Possibly a discount presaged a downward shift in the refiner's list price. However, the June 9, 1954 Thompson memorandum conclusively established the Company used "selling price" not "quoted" or "list" price, which is reenforced by the July 6 Thompson memorandum.[34] Rather, the

[33] Around this time some allowances from the list price were being announced publicly. In late 1957, the Great Western Sugar Company announced it would grant a bulk shipment allowance; and, in the Milwaukee- Chicago-St. Louis area, direct-factory-shipment allowance. DX 311 (Great Western Sugar Co., Brokers Circular Letter No. 191 (Dec. 2, 1957)).

[34] Other evidence also indicates that under Homer Thompson's tenure the Company did not simply use the refiners' list prices. Thus, in arriving at the averages for various refineries, the Purchasing Department averaged a refiner's quoted prices for different market areas. *See* DX 317 (reporting quoted market prices for 10 largest refineries for first quarter of 1958). This was also the practice in the first quarter of 1962. *See* DX 330. And, at least during 1959, the Company was unable to use the list price, for beginning

Footnote continued next page

"net" of the "list price," with an "allowance" deducted, represented the "market price."

In a 1956 memo from C.W. Hodgson, a Vice President of the Company, to Homer Thompson, the procedure for ascertaining the market price was set out following an inquiry from DeSales Harrison of the Thomas Company. DX 307 (August 20, 1956); PX 825 (same). Hodgson wrote he had investigated the question "thoroughly" with the Purchasing Department and with Ben Oehlert and Edgar Forio, both of whom were Vice Presidents of the Company, and had also done some "digging back into the files." The memorandum memorialized a telephone conversation between De Sales Harrison and Hodgson which recounted the Company's position. *Id.*

The memo noted that list prices given in Willett & Gray could not always be used because their publication dates did not coincide with the contract dates. It continued, at paragraph 3:

> [A]t times a refinery will sell below its own list price and that quoted by Willett & Gray. Under such circumstances the Purchasing Department has been using the lower price.... [W]here there was a possibility of two interpretations ... the Thomas Company and the Bottler had in every instance benefited.

Id.

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in February and March of that year refineries ceased to quote an f.o.b. price. The Purchasing Department therefore deducted the prepaid freight charges to arrive at an f.o.b. price. DX 323 (H.B. Thompson to John C. Staton (Apr. 3, 1959)).

Both Donald Leslie and John Mount, each of whom headed the Purchasing Department subsequent to Homer Thompson's tenure, testified the Hodgson memorandum was not a new policy, Tr. 917, 918 (Leslie), but was a truthful statement of the Company's interpretation of "market price" as used in paragraph 7 of the Consent Decrees. Tr. 868, 918-19 (Leslie); Tr. 786-87 (Mount). Leslie testified the Purchasing Department followed the policy stated in paragraph 3 of the Hodgson memorandum in computing the average market price of sugar during his tenure as head of the Department from 1960-69. Tr. 878.

The Company's computation of the formula for the first quarter of 1958 shows it used as sources for the refineries' prices Willett & Gray's *Weekly Sugar Trade Journal*, supplemented by daily market reports from Lamborn, a broker's bulletin, and several refinery price lists. DX 316 (H.B. Thompson to C.W. Hodgson (Jan. 8, 1958) (reporting average market price of refined cane sugar)).

The available evidence thus indicates that during the post-World War II period the Company has continued to make an independent investigation into the "market price," and has not relied solely on the refiners' list prices. In fact, the 1956 Thompson memorandum, *see supra* p. 1415, and the Hodgson memorandum both indicate the Company used the official price list merely as a ceiling from which the "market price" was derived, after deductions for such items as discounts or freight charges.[35] The Company underscores that Willett & Gray published actual selling prices, not "a fictitious list price." Tr. 843 (Leslie). This misses plaintiffs' argument that the Company is obligated to use a lower selling

[35] *See supra* note 34.

price if it is or should be aware one exists. The Hodgson memorandum strongly supports plaintiffs' view.

Plaintiffs allege this policy of the Purchasing Department changed in 1969 to the *1417 use of official list prices. Since that time, telexes sent by the Company to sugar refiners have asked for the "official list price." DX 343. This price is then used as the "market price" under the 1921 Consent Decrees unless the Purchasing Department is able to obtain from a refinery written confirmation that there has been a change in its official list price. Tr. 2830-35 (Konzal).[36] The Company denies this represents a change in policy.

The Court agrees with plaintiff that this new procedure of using only an "official price list" represents an abrupt change in policy and deviates from the Consent Decrees. The Hodgson memorandum, the Thompson memoranda, and other documentary evidence from the 1950s make it clear the Company did not confine itself to ascertaining the "official list price." The Hodgson memorandum specifically acknowledges that where there were two known prices at which sugar was sold, the Company used the lower price. No mention is made of always using a list price. The Thompson memoranda reflect that prices other than "official list prices" were used if the Company was able to verify with the refiner the accuracy of the lower price.

E. *Conclusion: "Market Price" in Paragraph 7*

The evidence does not support plaintiffs' definition of "market price" in its entirety. Nor is defendant's position

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[36] The refineries maintain separate price lists for purchase of bulk sugar in carload lots by industrial users. Tr. 757 (Mount). The Company has used this price to calculate "market price" since 1971, on the ground that bulk sugar in carload lots represents the new basis price. PX 852; PX 853; PX 854. *See supra* note 31 (explaining basis price).

wholly vindicated.

As noted previously, the circumstances leading up to the signing of the Consent Decrees reveal that the parties wanted a pricing formula for Coca-Cola Bottler's Syrup which would ensure that Coca-Cola would be competitive with other soft drinks, and which would also be verifiable. The inferences to be drawn from these objectives did not strongly support either side, however. The objective of pricing the syrup competitively supports plaintiffs' contention that "market price" is an actual selling price. The objective of having a verifiable price, on the other hand, tends to support the Company's position that market price is an "official list price." *See supra* p. 1408.

The parties' contemporaneous usage of the term "market price" provides some evidence that by "market price" the parties to the Consent Decrees meant "actual selling price." *See supra* pp. 1409, 1411. However, this evidence does not support an inference that the parties distinguished between an actual selling price or "market price" and a "list" or "quoted" price. *See supra* pp. 1409-10.

By far the most probative evidence is the parties' course of performance. The evidence tends to show that both during the early 1920s and in the post-World War II period there was a distinction in the sugar trade between a "quoted" or "list" price and an actual selling price. *See supra* pp. 1412, 1413-14, 1415, 1416. The parties were aware of this difference, *see supra* pp. 1414- 15. During 1924 there was disagreement between the parties over whether the syrup should be priced according to the lower price. This was apparently never resolved. *See supra* p. 1414.

The evidence available from the post-World War II period indicates "market price" was interpreted, from at least

1956 until 1969, in accordance with the Hodgson memorandum.[37] This memorandum, whose contents were communicated to the bottlers, established that the Company would use as a ceiling price the refiners' "list" or "quoted" price, which is a price quoted prior to sale and before any negotiations between the buyer and the seller. The Company would also undertake to ascertain from the refiner if the actual selling price was less than the "quoted" or "list" price. If it was, the Company would use that lower price.

In ascertaining whether a refiner is selling below its "list" or "quoted" price, the Company has traditionally made direct inquiry of the refiner. There is no evidence that the Company asked the refiner whether this lower selling price was available *to all* industrial users of sugar, however. Rather, it appears the Company has used the greatest discount, rebate, or allowance available. The only criterion for whether the Company would use a particular selling price is whether the refiner would represent to the Company that sugar was being sold at that price.

It appears that, during the 1950s, the Company would also query refiners upon receiving from its bottlers information that a refiner was selling below its "list" or "quoted" price. *See supra* p. 1415. However, the Company has apparently never formally inquired of its bottlers what they are

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[37] It is undisputed that since World War II the Company has consistently used, as the "market price" of sugar, the price for granulated sugar of the grade and in the packaging unit most commonly used in the sugar trade by industrial users. This was at one time referred to as the "basis" price. The trade continues to use this term, although the refiners no longer quote in terms of a basis price. *See supra* note 31.

Since the third quarter of 1971, the Company uses the price for fine granulated sugar in carload lots for industrial users as the "basis" price. PX 852 (J.M. Mount to J.H. Ogden (May 14, 1971)); PX 854 (W.L. Susong to W.R. Randolph (July 8, 1981)) (announcing charge to bottlers).

paying for sugar, nor taken into account its own negotiating experience, and it does not appear the Company has a duty to do so.

The policy contained in the Hodgson memorandum was communicated to the bottlers. DX 307. This policy has been accepted by the bottlers as the proper interpretation of "market price." The bottlers have not been informed of any superseding policy; indeed, the Company claims there has been no change. The Court concludes the Hodgson memorandum correctly sets forth the policy of The Coca-Cola Company with respect to market price.

"Market price" as used in paragraph 7 of the Consent Decrees means an average of the price per pound for refined granulated sugar of the grade and in the packaging unit in which it is principally sold to industrial users f.o.b. the refinery, as made known to such industrial users upon inquiry prior to sale by the ten refineries in the United States with the largest capacity and output during the first seven days of each calendar quarter, less any discounts, allowances, or rebates from that price which are available to industrial users or are made known to them upon inquiry prior to sale, but not including a standard two percent cash discount or any individually negotiated discounts, allowances, or rebates.

V. *Conclusion*

In the above opinion, which constitutes the Court's Findings of Fact and Conclusions of Law required by Rule 52(a) of the Federal Rules of Civil Procedure, I held on the certified issues relating to the 1921 Consent Decrees that: (1) the meaning of the term "sugar" as employed in paragraph 10 means refined granulated sugar from cane or beet sugar and that HFCS-55 is not sugar for purposes of paragraph 10,

and (2) for purposes of paragraph 7 the "market price" of sugar means an average of the price per pound for refined granulated sugar of the grade and in the packaging unit in which it is principally sold to industrial users f.o.b. the refinery, as made known to such industrial users upon inquiry prior to sale by the ten refineries in the United States with the largest capacity and output during the first seven days of each calendar quarter, less any discounts, allowances, or rebates from that price which are available to industrial users or are made known to them upon inquiry prior to sale, but not including a standard two percent cash discount or any individually negotiated discounts, allowances, or rebates.

I must conclude, however, with more than my holdings as to the certified issues. This case was a pleasure to try because of the outstanding ability of both teams of lawyers. The teams were very thoroughly prepared, had complete mastery of the voluminous record, prepared comprehensive trial briefs, tried the matter with graciousness and acumen, and following trial presented very accurate, annotated, and detailed proposed findings of fact and conclusions of law.

I cannot help but observe, however, that the efforts of these extremely talented attorneys may be misdirected. The basic problem is that the 1921 Consent Decrees are being used to govern an ongoing business relationship in the 1980s. Piecemeal litigation cannot satisfactorily resolve this problem. At best this litigation will only enhance or reduce bargaining power for the negotiations which must eventually take place.

There have been advances in technology, marketing, and in product lines and/or product extension which could not be foreseen in 1921 when the Consent Decrees were entered into. The parties would be better served by mutually

agreeing to work under a perpetual contract geared to the 1980s with a built-in mechanism for amendment to adjust to future change. Without such a mechanism, the long-term prospects are for unending litigation, as the parties founder in their efforts to adjust an obsolete contract to ever-changing conditions.

These extraordinarily capable attorneys should be able to negotiate a contract to fit the conditions of the 1980s between parties who need each other, provided they are assisted by clients whose unswerving objective is increasing the bottom line rather than incurring horrendous litigation expenses.

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, NYGAARD, ALITO AND LEWIS, Circuit Judges

The petition for rehearing filed by appellants/cross-appellees in the above captioned matter having been submitted to the judges of the circuit in regular active service*, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: March 23, 1993

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*Judge A. Leon Higginbotham participated in the decision, but retired from the bench on March 6, 1993, hence he did not consider the Petition for Panel Rehearing.